TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 32

JOHN MICHEL, PETITIONER,

vs.

STATE OF LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR CERTIORARI FILED SEPTEMBER 29, 1954

CERTIORARI GRANTED FEBRUARY 7, 1955

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IN THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS, STATE OF LOUISIANA

Section "A"

MINUTE ENTRY—IMPANELLING OF GRAND JURY—September 2, 1952

Present, the Honorable William J. O'Hara, Judge of the said Court.

"The following named persons constituting a part of the venire of seventy-five names drawn from the jury wheel in conformity to law by the Board of Jury Commissioners for the Parish of Orleans, returnable before Section "A" of this Court on this Tuesday September 2nd., 1952 at 10:30 O'clock A.M., to serve as Grand Jurors in Section "A" of this Court, during the regular September, 1952, to March, 1953, term of this Court, and found qualified, were selected by the Court as follows:

1. Roy Louis Alciatore
2. Otto Henry Armbruster
3. Russell Leonard Cuoco
4. John Milton deBen
5. Joseph Linsler Fournier
6. Louis Robert Hanemann
7. Charles Graham Justice, Jr.
8. Noel August Parmentel
9. Charles Steptoe Potter
10. George Jos. Roussel, Jr.
11. John B. Shober
12. Victor Willard Viosca

From the above named persons so selected, the Court appointed John Milton deBen, foreman of said Grand Jury.

The Grand Jurors were then regularly impaneled and sworn, in open Court, to inquire in and for the body of the Parish of Orleans, for the period of six months unless sooner discharged by the Court.

The aforesaid Grand Jury having been charged by the Honorable William J. O'Hara, Judge, presiding in Section "A" of this Court, were ordered retired to their room in care of the Criminal Sheriff for the Parish of Orleans, and after organizing, was discharged by the Court, subject to call. The Court ordered a signed copy
2 of the Court's charge to the Grand Jury, filed with the Clerk of the Criminal District Court for the Parish of Orleans.

In compliance with Revised Statute 16:8, The Honorable Severn T. Darden, District Attorney for the Parish of Orleans presented to the Court the following report to the Grand Jury, setting out in detail, the existing status or disposition made of Indictments brought in by the two preceding Grand Juries. The report was received by the Court ordered filed and made a part of the minutes of this Court, this day. After receiving permission of the Court, Mr. Darden presented to each of the aforesaid Grand Jurors, in open Court, a signed copy of the aforesaid report."

(Stapled onto the minute sheet of September 2nd, 1952, is a copy of the nine page report as referred to in the minute entry and following said minute entry)

Extract from the Minutes of this Court.
Clerk's Office, March 16th 1953.

(signed) A. B. HUMPHREY, *Minute Clerk.*

Filed March 23, '53. (signed) W. J. HAMMER, *Minute Clerk.*

IN THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS, SECTION "A"

MINUTE ENTRY—DISCHARGE OF GRAND JURY—March 2, 1953

Present, the Honorable William J. O'Hara, Judge of the said Court.

"The Grand Jurors of the State of Louisiana, Parish of Orleans, duly impaneled and sworn to inquire in and for the body of the Parish of Orleans, this day through their Foreman, J. Milton deBen, presented to the Court their final report, which was received by the Court, ordered filed and made a part of the minutes of the
3 Court.

(Stapled onto the Minute sheet of March 2nd, 1953, is a copy of the final report, referred to above.) Thereupon, the Court thanked each of the Grand Jurors for their services rendered this Court, and discharged them without day. Eleven members were present and one (Mr. Russel L. Cuoco) was absent."

Extract from the Minutes of the Court.
Clerk's Office, March 16, 1953.

(signed) A. B. HUMPHREY, *Minute Clerk.*

Filed March 23, '53. (signed) J. HAMMER, *Minute Clerk.*

4 MINUTE ENTRY OF FEBRUARY 19, 1953

Indictment for violation of R. S. 14:42

A true bill. (Signed) J. MILTON DEBEN, *Foreman of Grand Jury.*

Returned into open court and recorded and filed February 19th, 1953. (Signed) A. B. HUMPHREY, *Minute Clerk.*

The court ordered the above indictments recorded and filed, a capias issued for defendant Sidney Reyes, with bail fixed in the sum of one thousand dollars and an alias capias without bail issued for each of the defendants, Roy A. Curtis, O'Neil Williams, Ethel Hallen, Andrew Wilson and John Michel.

MINUTE ENTRY OF FEBRUARY 23, 1953

Indictment for violating R. S. 14:42.

On motion of the defendant, the court granted the defendant until Monday March 2nd, 1953, in which to employ counsel. This arraignment continued to said date and the defendant, remanded.

MINUTE ENTRY OF MARCH 2, 1953

Indictment for violating R. S. 14:42

The court appointed G. Schreiber, Esq., to represent the defendant in this matter. On motion of the defense the court ordered this arraignment continued to Monday March 9th., 1953 and the defendant remanded.

5 MINUTE ENTRY OF MARCH 9, 1953

Indictment for violating R. S. 14:42

The defendant through his counsels, G. Fust Esq., and G. Schreiber Esq., did this day file with the court a motion to quash. The court ordered this matter specially fixed for hearing on March 23rd., 1953. On joint motion of the State and the defense, the court ordered that this case be specially fixed for trial on May 25th., 1953 and the defendant remanded.

MINUTE ENTRY OF MARCH 23, 1953

Indictment for violating R. S. 14:42

The defendant accompanied by his counsels, G. Fust esq., and G. Schreiber Esq., was placed at the bar of the court. A motion to Quash having previously been filed by the defense, the State this day filed written answer along with demurrer, to said motion to Quash. The State further filed in support of said answer, Extract of the Minutes of Sec. "A", for Sept. 2, 1952 and March 2, 1953. The court granted the defendant until Monday March 30th., 1953, in which to answer the State's Demurrer. The defendant was then remanded.

MINUTE ENTRY OF MARCH 30, 1953

Indictment for violating R. S. 14:42.

The defendant accompanied by his counsels, G. Fust Esq., and G. Schreiber Esq., was placed at the bar of the court. The defense, did this day file with the court, written answer, to the State's Demurrer, said Demurrer, having previously been filed by the State on March 23, 1953, in answer to the defendant's motion
6 to Quash, filed on March 9, 1953. In support of the defense's answer to the State's Demurrer, G. Schreiber Esq., and G.

Fust, Esq., were duly sworn by the clerk, testified on the part of the defense and were cross-examined on behalf of the State. In connection with the testimony of Mr. Schreiber, the defense offered in evidence, the following numbered and entitled records of the criminal District Court, to-wit: No. 138-324, State Vs. Alfred Dowel; No. 136991, State Vs. Robert Green, Jr., and No. 121-241, State Vs. John Michel. No objection by the State. The State argued. The defense argued. The matter was then submitted by both sides, whereupon, the court took this matter under advisement until Wednesday April 8, 1953. The court informed both sides that it (the court) would render a decision upon said date. The court further instructed the State and the defense to submit any law that they might so desire, by way of Briefs before the date set by the court for rendering a decision in this matter. The defendant was then remanded.

Minute Entry of April 8, 1953

Indictment for violating R. S. 14:42

The defendant accompanied by his counsels, G. J. Schreiber and Geo. Fust, was placed at the bar of the court. On March 30th., 1953, the court took under advisement, motion to quash, filed by defense and Answer and Demurrer filed by the State. The court did this day Sustain the Demurrer, filed by the State and further the court Dismissed the motion to Quash, filed by the defense.

7 To which ruling of the court counsels for the defendant, objected and reserved a bill of exceptions. Counsels for the defendant, herewith, motioned, orally, to submit evidence in support of the Motion to Quash, which motion was denied by the court, to which ruling of the court counsels for the defendant, objected and reserved a bill of exceptions. On motion of counsels for the defendant, the court granted the defendant, to Wednesday April 22nd., 1953, to file any further special pleadings. The defendant was then, remanded.

Minute Entry of April 22, 1953

Indictment for violating R. S. 14:42

The defendant accompanied by his counsels, G. Fust Esq., and G. Schreiber Esq., was placed at the bar of the court. Counsels for the defendant, this day filed with the court a motion to perpetuate Testimony, said motion was Denied by the court, to which ruling of the court counsels for the defendant, objected, and reserved a bill of exceptions. Counsels for the defendant then filed with the court a motion for a bill of particulars, the court granted said motion and ordered the State to furnish the particulars asked for by the defendant in his motion on or before April 27,

1953. Counsels for the defendant further filed with the court a Prayer for Oyer, whereupon the court ordered the State to show cause on April 27th, 1953 at 10:30 o'clock A.M. why the relief prayed for in defendant's Prayer for Oyer, should not be granted. The court then ordered the defendant remanded to April 27th, 1953.

8 MINUTE ENTRY OF APRIL 27th, 1953.

Indictment for violating R.S. 14:42

The defendant accompanied by his counsels, G. Fust, Esq., and G. Schreiber Esq., was placed at the bar of the court. The State this day filed written answer to defendant's motion for a bill of particulars, said answer was deemed sufficient by the defense, whereupon, the court ruled accordingly. The State did this day further file with the court written answer to defendant's Prayer for Oyer. The court ruled the State's answer to be sufficient in law, to which ruling of the court counsels for the defendant, objected and reserved a bill of exceptions. On motion of the defense, the court granted the defendant until April 29, 1953 in which to file further special pleadings, the defendant was then remanded.

MINUTE ENTRY OF APRIL 29, 1953

The defendant accompanied by his counsels, G. Fust Esq., and G. Schreiber Esq., was placed at the bar of the court. Counsels for the defendant did this day file with the court a motion for Supplemental Bill of Particulars, whereupon, the court issued the following order: "It is ordered by the court, that a hearing on the aforesaid motion be held on the 4th day of May, 1953 at 10:30 o'clock A. M., and that the Honorable Severn T. Darden, District Attorney for the Parish of Orleans, be and he is hereby ordered to show cause at the said time and place why the particulars asked for in the aforesaid motion should not be granted.

(Signed) NEILS F. HERTZ, *Judge*.

New Orleans, La., April 29th, 1953.

9 MINUTE ENTRY OF MAY 4, 1953

Indictment for violating R. S. 14:42

The defendant accompanied by his counsels G. Fust Esq. and G. Schreiber, Esq., was placed at the bar of the court. The court ruled that the answer filed by the State on April 30, 1953 to defendant's Supplemental motion for a bill of particulars, was sufficient in law to which ruling of the court counsels for the defendant, objected and reserved a bill of exceptions. The defendant was then arraigned (the clerk read the indictment to the defendant) and pleaded Not

Guilty. By agreement State and defense, this case specially fixed for trial on May 25th., 1953. The defendant was then remanded.

MINUTE ENTRY OF MAY 25, 1953

Indictment for violating R. S. 14:42

The defendant accompanied by his counsels G. Fust Esq., and G. Schreiber Esq., was placed at the bar of the court for trial. The State was represented by, Assistant District Attorneys, George Gulotta, Esq., and Peter J. Compagno Esq., The State and the defense being ready for trial, the following named jurors, to-wit: Thomas C. Blythe, Robt. E. Deck, Wm. E. Fitzmaurice, Lawrence V. Logan, Douglas O'Reilly, Jules F. Peytral, Joseph M. Squeier, were regularly accepted, duly sworn and empanelled to serve as jurors in this case. The jury panel of this court (Sec. "F") having been exhausted at this point, the court ordered that the names of the jurors of the jury panel of Sec. "D" of this court be put in the jury box. The following named jurors from the panel of Sec. "D", to wit: Frank H. Culotta, Wilfred J. Drez, Ellis E. Fortinberry, Raymond Frischhertz and Edgar Louis Stine, were regularly accepted, duly sworn and empanelled to serve as jurors in this case.

The defense used, 12 challenges. The State, 8 challenges. 14 jurors, were excused for cause, and 8, jurors were excused by consent. The hour being 8:45 P. M., the court ordered a recess, until 10:00 oclock A. M. Tuesday, May 26th, 1953. Before recessing the court instructed the jury as to the law, the court then placed the jury into the custody of the Criminal Sheriff for the night. The court then ordered the defendant, remanded.

MINUTE ENTRY OF MAY 26, 1953

Indictment for violating R. S. 14:42

The defendant accompanied by his counsels, G. Fust Esq., and G. Schreiber Esq., was placed at the bar of the court. The State being represented by Ass't. District Attorneys, George Gulotta and Peter J. Compagno. The empanelling of the jury for this case having been completed last night at 8:45 P. M. The court having at that time ordered a recess until this morning at 10:00 A. M. The jurors were then placed in the jury box. The jury was polled by the clerk, and all jurors found to be present. Counsels for the defendant, herewith, filed with the court application for writ of subpoena Duces Tecum, said application, being denied by the Court to which ruling of the court counsels for the defendant, object and reserved a bill of exceptions. The clerk read the indictment to the jury. The State made its opening statement. The defense made an opening statement. The defense requested that the court's charge to the jury be in writing, said request was granted by the court. Earl Burmaster, A. J. Palumbo, Raymond Johnson, John A. Dahman, Estelle Schneider,

Dr. R. Gillespie, Rosemary Misurata, Patricia Daniels, Patrick Natal and Capt. Wm. Walker, were duly sworn by the clerk, testified on the part of the State and were cross-examined on behalf of the defense. After the testimony of Dr. Gillespie, and, before the testimony of Rosemary Misurata, On motion of the State, the court, along with the jury, the defendant and his counsels, retired to the Coroner's office to view some color slides, the actual time consumed, being from 5:20 P. M. to 5:35 P. M. Counsels for the defendant, objected, to the ruling of the court in this matter, and reserved a bill of exceptions. In connection with the testimony of Estelle Schneider the State introduced as evidence the following: One picture, S-1; One picture, S-2; One Picture, S-3; One Picture, S-4; One Picture, S-6; One Picture, S-7; One Picture, S-8; Panties of the Victim, S-12; Clothing, shirt and bluejeans of the witness, S-13; No objection by the defense to any of the introductions, thus far. In connection with the testimony of the same witness, the State introduced as evidence, the following: Purse and contents, of the witness, S-14, Objection, by the defendant, Overruled by the court, Bill of exceptions reserved. Two pictures, S-10 and S-11, Objection by the defense to both pictures, Overruled, by the court, Bill of exceptions, reserved. Seven (7) color slides, S-9, Objection by the defense, Overruled by the court, Bill of exceptions, reserved. There were many oral motions for Mistrial, made by the defense, (taken by Court Stenographer) all being, Denied, by the Court, Bills of Exception, reserved by the defense. During the testimony of Capt. Walker, the hour being 11:00 P.M. the court ordered a recess in this matter to 10:00 A. M. to-morrow, morning. Before recessing the court instructed the jury, according to law. The court then placed the jury in the custody of the Criminal Sheriff for the night. The court then ordered the defendant, remanded.

11

12 MINUTE ENTRY OF MAY 27, 1953

Indictment for violating R. S. 14:42.

The defendant, accompanied by his counsels, G. E. Schreiber, Esq., and C. Fust Esq., was placed at the bar of the court. The State being represented by Assistant District Attorneys, Geo. Guiotta Esq., and Peter J. Compagno Esq. This case having been recessed last night (May 26th., 1953) at 11:00 P. M. until 10:00 A. M. this morning, The jurors were placed in the jury box. The clerk polled the jury, all jurors, were present. Capt. Wm. Walker, Albert Pierre and John Haggerty, were duly sworn by the clerk, testified on the part of the State and were cross-examined on behalf of the defense. In connection with the testimony of Capt. Walker, the State introduced as evidence a white envelope addressed to Jonn Michel, S-15, to which introduction, objection was made by the the defense, the court overruled, said objection, to which ruling of

the court, counsels for the defendant reserved a bill of exceptions. In connection with the testimony of J. Haggerty, The State introduced as evidence the following: Gold Wristwatch, S-16, Black Stone Ring, S-17; Gold band ring, S-18. Counsels for the defendant, objected to the three, aforementioned, introductions, which objections were overruled by the court, to which ruling of the court counsels for the defendant, reserved Bills of exception. At this point on motion of the defense, the jury was retired to the jury room, in order to allow the court, to hear evidence as well as rule, on the admissibility of a confession. The hour being 11:40 A.M. Out of the presence of the jury, the following named witnesses, to-wit: Sgt. N. Wirth, Off. E. Larson, Off. T. Claven, Off. O. Kuasmol, Sgt.
13 J. Mariana, Off. R. Walsh, Off. J. Parker, Off. J. Ventrolia, Sgt. V. Mancuso, Off. A. Otillo, Off E. Landry, Off. H. Swanson, Det. W. Daniels, Capt. W. Walker and Off. D. Forestiere, were duly sworn by the clerk, testified on the part of the State and were cross-examined on behalf of the defense. Submitted by the State, as to the admissibility of the confession. Still, out of the presence of the jury, The defendant, John Michel, was duly sworn by the clerk, testified on the part of the defense and was cross-examined on behalf of the State. Submitted, by the defense as to the admissibility of the said confession. The court ruled that the alleged confession was made freely and voluntarily and should be read to the jury. To which ruling of the court counsels for the defendant objected and reserved a bill of exceptions. At this point the jury was returned into open court. The hour was 5:00 P. M. The following named witnesses, to wit: Sgt. N. Wirth, Off. E. Larson, Off. T. Claven, Off. O. Kuasmol, Sgt. J. Mariano, Off. R. Walsh, Off. J. Parker, Off. J. Ventrolia, Sgt. V. Mancuso, Off. E. Landry, Off. R. Otillo, Det. W. Daniels, Capt. W. Walker, Off. D. Forestiere and Off. H. Swanson, were duly sworn by the clerk; testified on the part of the State and were cross-examined on behalf of the defense. In connection with the testimony of all the aforementioned witnesses, the State introduced as evidence, an alleged confession of the defendant, S-19. The defense objected to the introduction of the alleged confession, the court overruled said objection, to which ruling of the court counsels for the defendant reserved a bill of exceptions.

Still in connection with all of the aforementioned witnesses,
14 the State introduced as evidence the following: One pair of blue jeans, S-20. One light green shirt, S-21. One green and yellow sport shirt, S-22. No objection by the defense. The State rests. The following named witnesses, to-wit: Geo. Fleet, Ike Dupree, Marcel Scorza, Geo. Fust, Father Gregory Frank, Mrs. E. Jenkins, J. L. Ellsworth, L. J. Vaccaro and Adam Clouate, were duly sworn by the clerk, testified on the part of the defense and were cross-examined on behalf of the State. In connection with the

testimony of G. Fust, the defense introduced as evidence, a instanter subpoena on one Ronald Parker, D-1. The defense rests. The hour being 10:00 P.M. the court ordered a recess, until to-morrow, at 10:00 A.M. Before recessing the court instructed the jury as to the law, the court then placed the jury into the custody of the Criminal Sheriff for the night. The court then ordered the defendant remanded.

MINUTE ENTRY OF MAY 28, 1953

Indictment for violating R. S. 14:42

Verdict

The defendant accompanied by his counsels, G. Fust Esq., and G. Schreiber, Esq., was placed at the bar of the court. The State being represented by Ass't. Dist. Attorneys, George Gulotta Esq., and Peter J. Compagno Esq., Both State and Defense having rested Last night before adjournment: Court adjourned last night at 10:00 P. M. until 10:00 A. M. this morning for argument. The jury was placed in the jury box, polled by the clerk and found to be all present. Counsels for the defendant filed with the court eight (8) special charges. Mr. Compagno, Made the State's opening argument. Mr. Fust, then, Mr. Schreiber, both, argued for the defense. Mr. Gulotta, made the State's closing argument. The court,
15 Denied, all eight (8) of the defendant's special charges, to which ruling of the court counsels for the defendant, objected and reserved Bills of exception. The Court delivered its charge to the jury at the hour of 3:25 P. M. and at the close of said charge, the court presented the jury with a written list of the responsive verdicts. The jury retired to deliberate at the hour of 3:55 P. M. and returned into open court at the hour of 6:10 P. M. with the following verdict: "May 28th., 1953. Guilty as charged. (signed) Wilfred J. Drez, Foreman." On motion of the defense, the court ordered the jury polled. The clerk polled the jury and the verdict found to be unanimous. The court then ordered the verdict of the jury recorded and filed, along with the list of responsive verdicts, returned by the jury, said written list of responsive verdicts, previously having been presented the jury by the court, according to law. The court's charge being written, said charge was filed in the record. The petty jury was then discharged by the court. The defendant was then remanded to await further legal proceedings.

MINUTE ENTRY OF JULY 6, 1953

Indictment for violating R. S. 14:42

The defendant accompanied by his counsels G. Fust Esq., and G. Schreiber Esq., was placed at the bar of the court. The defend-

ant, through his counsels did this day file with the court A motion for a New Trial and Motion in Arrest of Judgment. By agreement, the court ordered both these matters specially fixed for hearing on Monday July 13, 1953. The defendant was then remanded.

16 MINUTE ENTRY OF JULY 13, 1953

Indictment for violating R.S. 14:42.

The defendant accompanied by his counsels G. Fust Esq., and G. Schreiber Esq., was placed at the bar of the court, for hearing on a motion for a new trial and motion in arrest of judgment. Motion for a New Trial, argued by State and defense and submitted, the court Overruled, Defendant's motion for a new trial, to which ruling of the court counsels for the defendant, objected, and reserved a bill of exceptions. Motion in arrest of Judgment, argued by State and defense, and submitted. The court denied defendant's motion in arrest of judgment, to which ruling of the court counsels for the defendant objected and reserved a bill of exceptions. The defendant was then ordered, remanded to await further legal proceedings.

MINUTE ENTRY OF AUGUST 6, 1953

Indictment for violating R.S. 14:42.

On motion of G. Schreiber Esq., counsel for the defendant, the court continued this sentence to August 17th., 1953 and ordered the defendant, remanded.

MINUTE ENTRY OF NOVEMBER 2, 1953

Indictment for violating R.S. 14-42.

G. Fust Esq., and G. Schreiber Esq., on behalf of the defendant, did this day file with the court a supplemental motion for a new trial. The court took the said motion under advisement, until Tuesday November 3rd., 1953. The defendant was then remanded.

17 MINUTE ENTRY OF NOVEMBER 3, 1953

Indictment for violating R.S. 14:42

The defendant accompanied by his counsel G. Fust Esq., was placed at the bar of the court. The court DENIED defendant's supplemental motion for a new trial, filed, on Monday November 2nd., 1953. To which ruling of the court counsel for the defendant objected and reserved a bill of exceptions. Counsel for the defendant, herewith presented to the court 42 Bills of exception. The court ordered said Bills, filed by the clerk. The court ordered that this matter be continued to Monday November 9th., 1953 for sentence. The defendant was then ordered remanded.

MINUTE ENTRY OF NOVEMBER 9, 1953

Indictment for violating R.S. 14:42.

Sentence

The defendant accompanied by his counsel G. Fust Esq., was placed at the bar of the court for sentence. The court having signed all bills of exception at 9:00 o'clock A.M. This date. The court further, having written and signed all per curiams, at 9:30 o'clock A.M. this date, ordered same filed by the clerk. The defendant being ready for sentence, the court sentenced the defendant, as follows: "JOHN MICHEL, the jury in your case having found you guilty of aggravated rape as charged in the indictment found against you by the Grand Jury of the Parish of Orleans, it is hereby ordered, and it is the sentence of the Court that you, JOHN MICHEL, be remanded to the Parish Prison, of the Parish of Orleans, there to remain in the custody of the Criminal Sheriff of the Parish of Orleans, until your execution, on such day, at such hour and place as may be designated in his warrant by the Governor of the State of Louisiana; and your execution be caused by the
18 passing through your body a current of electricity of sufficient intensity to cause death, and by the application and continuance of such current through your body until you are dead, as prescribed by Act 14 of the regular session of the Legislature of the State of Louisiana, for the year, 1940.

Pronounced in open court, in the presence of the accused, his counsel and the District Attorney of the Parish of Orleans, on this 9th day of November, 1953, at 10:30 o'clock A.M.

(Signed) NIELS F. HERTZ; *Judge*."

Counsel for the defendant, G. Fust Esq., herewith, presented to the court a motion for a Suspensive Appeal to the Honorable, The Supreme Court of the State of Louisiana. The said motion being filed by the clerk. The court granted said motion for appeal, signing same at 10:35 o'clock A.M. this date. Date returnable, being, January 4th., 1954. The court then ordered the defendant remanded without benefit of bail.

19 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS.
SECTION "F"

INDICTMENT

The Grand Jurors of the State of Louisiana, duly impaneled and sworn in and for the body of the Parish of Orleans, in the name and by the authority of the said State, upon their oath, Present That one JOHN MICHEL late of the Parish of Orleans on the tenth day of February in the year of our Lord, one thousand, nine hun-

dred fifty-three with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans committed aggravated rape upon one ESTELLE SCHNEIDER, contrary to the form of Statute of the State of Louisiana in such cases made and provided and against the peace and dignity of the same.

(Signed) SEVERN T. DARDEN,
District Attorney for
the Parish of Orleans.

Copy of Indorsements Appearing on Indictment

No. 141-241, Section "F", State of Louisiana versus John Michel, Indictment for Vio. R.S. 14:42 (Aggravated Rape).

A True Bill. (Signed) J. Milton deBen, Foreman of Grand Jury. New Orleans, Feb. 19, 1953.

Returned into open Court and recorded and filed February 19th, 1953. (Signed) A. B. Humphrey, Minute Clerk.

2-19-53. Alias Capias issued—no bail.

20 Feb. 23, '53.

On motion of the Def. the court granted the Def. until Monday, March 2, 1953 in which to employ counsel. This arraignment cont'd. to said date.

(Signed) W. J. HAMMER,
Minute Clerk.

March 2, '53.

The court appointed Mr. G. Schreiber Esq. to represent the Def. and ordered this arraignment cont'd. to Monday, Mar. 9, 1953.

Mar. 9, 1953.

Motion to Quash filed by def. Specially fixed for hearing on March 23, '53. On joint motion of State and Def. the court ordered this case specially fixed for trial on May 25, '53. Notify all witnesses.

(Signed) W. J. HAMMER,
Minute Clerk.

March 23, '53.

The State filed written answer and Demurrer to Def's. motion to Quash. The court allowed the defense counsel to March 30, '53, to prepare answer to State's Demurrer.

(Signed) W. J. HAMMER,
Minute Clerk.

March 30, '53.

The defense did this day file Answer to the State's Demurrer previously filed. The court after hearing evidence and argument by both sides, took this matter under advisement until Wed. April

8, 1953, at which time, the court informed both sides that it (the court) would render a decision. The court further instructed the State and Defense to submit any law, by way of Briefs before said date, set for decision in this matter.

(Signed) W. J. HAMMER,
Minute Clerk.

21 April 8, '53.

The court did this day sustained the Demurrer, filed by the State and further the court dismissed the Motion to Quash filed by the defense. On motion of the defense the court granted defendant until April 22, 1953, to file any further special pleadings.

(Signed) W. J. HAMMER,
Minute Clerk.

April 22, 1953.

Counsels for the defendant this day filed with the court a Motion to perpetuate testimony. The court denied said motion. Counsels for Def. then filed a motion for a Bill of Particulars, the court granted Def's motion and ordered the State to furnish the particulars requested on or before April 27th '53. Counsels for the Def. further filed with the court, Prayer for Over. The court ordered the State to show cause on April 27th '53, why relief prayed for in defendant's Prayer for Over should not be granted.

(Signed) W. J. HAMMER,
Minute Clerk.

April 27, '53.

The State filed written answer to Def's Bill of Particulars, the defense accepted said answer to its sufficiency and the court ruled accordingly. The State filed written answer to Def's prayer for Over. The court ruled the State's answer sufficient in law, to which ruling of the court the def. objected and reserved a bill. The court granted the defense to April 29, '53, to file further pleadings.

(Signed) W. J. HAMMER,
Minute Clerk.

April 29, '53.

Counsels for the defendant this day filed with the court a motion for supplemental bill of particulars. The court ordered the state to show cause on May 4, '53, why the particulars requested should not be granted.

(Signed) W. J. HAMMER,
Minute Clerk.

22 April 30, '53.

The State did this day filed with the court written answer to def's. motion for supplemental bill of particulars.

(Signed) W. J. HAMMER,
Minute Clerk.

May 4, '53.

The court ruled that the answer filed by the state on April 30, '53, to def's motion for supplemental bill of particulars was sufficient in law, to which ruling of the court counsel for the def. objected and reserved a bill of exceptions. The def. was then arraigned. The clerk read the Indictment to Def. and pleaded not guilty. This matter specially fixed for trial on May 25, '53. Notify all witnesses.

(Signed) W. J. HAMMER,
Minute Clerk.

May 25, '53.

Trial of this case started and jury selected (see minutes).

(Signed) W. J. HAMMER,
Minute Clerk.

May 26, '53.

Trial of this case in progress and testimony being taken.

May 28, 1953.

Guilty as charged.

(Signed) WILFRED J. DREZ,
Foreman.

May 28, '53.

The defendant remanded to await sentence.

(Signed) W. J. HAMMER,
Minute Clerk.

23 July 6, '53.

Counsels for the defendant this day filed with the court, motion for a new trial, and, motion in arrest of judgment. By agreement, the court ordered this matter (both motions) specially fixed for hearing Monday July 13, 1953.

(Signed) W. J. HAMMER,
Minute Clerk.

July 13, '53.

Motion for New trial overruled by court, to which defense objected and reserved a bill of exceptions. Motion in Arrest of

Judgment denied by the court, to which the Defense objected and reserved a bill of exceptions.

(Signed) W. J. HAMMER,
Minute Clerk.

August 6, 1953.

On motion of defense, the court continued sentence in this case to August 17, '53.

(Signed) W. J. HAMMER,
Minute Clerk.

Nov. 2, '53.

Supplemental motion for new trial filed by defense. Specially fixed for Nov. 3, '53.

(Signed) W. J. HAMMER,
Minute Clerk.

Nov. 3, '53.

Supplemental motion for new trial overruled by court, counsel for def. objected and res. a bill of exception. G. Fust Esq., counsel for defendant, this day filed with the court 43 bills of exception. The court ordered said exceptions filed and set Monday November 9, '53 as the day for sentence.

(Signed) W. J. HAMMER,
Minute Clerk.

24 Nov. 9, '53.

The defendant accompanied by his counsel G. Fust, Esq., was placed at the bar of the court for sentence. The court this day signed the Bills of exception (42) filed by defendant Nov. 3, '53. The court this day ordered filed, and signed its per curiams to all of defendants Bills of exceptions. The court then sentenced the defendant to death by electricity (see record). Counsel for def. G. Fust Esq., herewith filed with the court motion for suspensive appeal. The court signed the motion for appeal making same returnable January 4, 1954. The defendant was then remanded.

(Signed) W. J. HAMMER, *Minute Clerk.*

[File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

MOTION TO QUASH—Filed March 9, 1953

Now into this Honorable Court comes John Michel, defendant herein, and having heard the Indictment read and protesting that he is not guilty of the offense set out therein, moves to quash the said Indictment in its entirety and to quash and set aside

the general venire involved herein and to quash and set aside the Grand Jury Panel herein for the reason that in the proceedings prior to and attending the presentment of said Indictment, mover was deprived of due process of law and equal protection of law as guaranteed by the Constitution of the United States and the State of Louisiana, as follows:

25 1. Defendant is a member of the colored race.

2. That considering the negro population of the Parish of Orleans and the number of negroes qualified for jury service, there has been systematic, unlawful and unconstitutional exclusion of negroes from the general venire and Grand Jury Panel and Grand Jury involved in the returning of the Indictment herein; that said systematic, unlawful and unconstitutional exclusion of negroes from said units has existed continuously prior hereto for a number of years in the Parish of Orleans; that said exclusion has existed because of race or color; that a negro has never served on a Grand Jury in the Parish of Orleans; that in those instances where negroes have been included in the general venire and Grand Jury Panels referred to herein, negroes have been discriminated against by an arbitrary and inapportionate limiting of their number by State officials who have not sufficiently acquainted themselves with the qualifications of all potential jurors.

WHEREFORE, the said John Michel prays that this Motion to Quash be maintained and that the said Indictment, general venire and Grand Jury Panel be declared null and void and that he be discharged from said Indictment.

(Signed) GERARD H. SCHREIBER,
GEORGE H. FUST,
Attorneys for Defendant.

Duly sworn to by John J. Michel, jurat omitted in printing.

26 March 9, '53.

Let the State of Louisiana through the District Attorney, show cause on the 16th day of March 1953, at 10:30 o'clock A.M., why the relief prayed for should not be granted.

(Signed) NIELS F. HERTZ,
Judge.

[File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

ANSWER AND DEMURRER TO MOTION TO QUASH—Filed March 23, 1953

Now into Court comes the State, represented herein by Peter J. Compagno and George J. Gulotta, Assistant District Attorneys for the Parish of Orleans, and answering the Motion to Quash filed herein; now offer the following answer and demurrer:

1. That the said Motion to Quash is not good in law and of no legal effect for the reason that the said motion was not filed, pleaded and urged before the expiration of the third judicial day of the Grand Jury term for the Parish of Orleans, State of Louisiana, by which the defendant herein was indicted.

2. That the defendant, as shown by the indictment herein, was indicted and the indictment returned and filed in open Court on February 19, 1953, in Section "F" of the Criminal District Court for the Parish of Orleans, as shown by the endorsement on the back of the said indictment itself.

27 3. That the Grand Jury that indicted the defendant herein as shown by the records and minute entries of the said Court offered and filed in evidence herein, was impanelled, selected and sworn, and went into office on the 2nd day of September, 1952, as shown by the record and minute entries of the said Court, and that the said Grand Jury was discharged on March 2, 1953; and that under the provisions of R. S. 15:262, any objection to the manner of selecting or drawing a Grand Jury, or any defect or irregularity in the impanelling and selection of a Grand Jury, must be urged before the expiration of three judicial days after the Grand Jury term expires, or before entering upon the trial of the case, if it be done sooner.

4. That the Motion to Quash was filed herein on the 9th day of March, 1953, as shown by the endorsement on the back of the Bill of Indictment itself, more than three judicial days after the expiration of the Grand Jury term of the Grand Jury that indicted the defendant herein.

WHEREFORE, the State prays that this Honorable Court sustain the answer and demurrer to the Motion to Quash the indictment herein, and dismiss the Motion to Quash as being of no legal effect.

(Signed) PETER J. COMPAGNO,
Assistant District Attorney.
GEORGE J. GULOTTA,
Assistant District Attorney.

New Orleans, Louisiana,
March 23rd., 1953.

April 8, 1953.

The demurrer of the State of Louisiana is sustained and accordingly the Motion of defendant to Quash the Indictment is dismissed.

(Signed) NIELS F. HERTZ,
Judge

[File endorsement omitted]

28 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

ANSWER TO DEMURRER—Filed March 30, 1953

Now into this Honorable Court comes John Michel, defendant herein, appearing through undersigned counsel, and for answer to the Demurrer filed in behalf of the State of Louisiana to defendant's Motion to Quash, says:

1. That defendant, in support of his Motion to Quash the indictment and to quash and set aside the Grand Jury Panel and the Grand Jury which indicted him, was prepared to prove:

(1) That defendant is a member of the colored race.

(2) That the three jury commisisoners who set up the general venire and the Grand Jury Panel from which the Grand Jury was selected which returned the indictment of defendant, plus all State Officials in any way connected with the returning of the indictment are all white men and are members of the Caucasian race.

(3) That the twelve members of the Grand Jury which returned this indictment on February 19, 1953 are all white men and are of the Caucasian race.

(4) That no negro has served on the Grand Jury for the Parish of Orleans for the past thirty years, with the exception of one man who served approximately sixteen years ago, by the name of Ruffin J. Walker, who, at the time of his acceptance on the Grand Jury, was believed to be a white man due to his light color.

(5) That the population of the City of New Orleans or Parish of Orleans, from which the jurors are chosen, according to the United States Department of Commerce, Bureau of the Census, is divided as to negro and white, as follows, for the years indicated:

29

Year	*White*	*Negro*
1930	328446	129632
1940	344775	149034
1950	459400	227300

(6) That the number of registered voters of the City of New Orleans or Parish of Orleans was divided on the dates indicated below, as follows:

	White	*Negro*
October 7, 1950	186866	26029
March 1, 1952	194794	25545

(7) That there is, and has been for many years past, a large number of colored males who can meet the qualifications fixed by law for grand jurors.

(8) That colored males have been serving in the Federal Courts in New Orleans on petit juries and grand juries for fifty years and more.

(9) That there has been one colored university in existence in the City of New Orleans since 1869, and that there have been at least two in existence since 1915.

(10) That there are four complete public high schools for colored; two junior high schools for colored; and four parochial high schools for colored, in the City of New Orleans and Parish of Orleans.

(11) That the colored public high schools in the City of New Orleans and Parish of Orleans have graduated over 5,200 students; and the colored parochial high schools have graduated over 800 students.

(12) That in 1952, in the elementary grades, there were 28,295 white students in schools for whites, and 25,896 colored students in schools for colored; that in 1942, in the elementary grades, there were 27,824 white students in schools for whites, and 20,612 colored students in schools for colored, all of these schools being public schools.

(13) That there are twelve or more insurance companies in the City of New Orleans exclusively owned and operated by colored persons.

(14) That there are more than fifty colored physicians in the City of New Orleans, about one dozen colored dentists, and ten or more colored pharmacists; and that there have been two weekly colored newspapers owned and operated by colored personnel in the City of New Orleans for several years.

(15) That there is a colored hospital in the City of New Orleans, the staff of which is about evenly divided between colored and white doctors.

(16) That one of the insurance companies mentioned in (13) above has assets of over $2,000,000.00, and employs some two hundred colored persons in the operation of its business.

(17) Plus other facts, in addition to the ones listed in Nos. (1) thru (16) above, to show that there has been intentional

and or systematic exclusion of negroes from grand juries in the Parish of Orleans, and the grand jury which returned the indictment against defendant.

2. That the alleged error of defendant's having filed his Motion to Quash after the expiration of the third judicial day of the term for which said grand jury shall have been drawn, as urged by the State in its Demurrer to Motion to Quash, is merely procedural; that the errors complained of in defendant's Motion to Quash are sufficiently serious and prejudicial under our jurisprudence to warrant the quashing of the indictment.

3. That the position urged by the District Attorney for the State in its demurrer is contrary to the time honored judicial practice in the Parish of Orleans and State of Louisiana, including the term of the present District Attorney, which was to permit motions to quash, such as that filed herein to be filed at any time
31 before trial, even after defendants had been arraigned and pleaded and were permitted to withdraw their pleas and file such motions.

4. That Code of Criminal Procedure Article 202 is subject to a liberal interpretation in favor of the defendant.

5. That if not liberally construed in favor of defendant's Motion to Quash, Code of Criminal Procedure Article 202 is unconstitutional because it denies due process and equal protection as guaranteed under the Constitutions of the United States and of the State of Louisiana.

6. The limitation upon the rights of the defendant which the District Attorney places in his interpretation of Code of Criminal Procedure Article 202 denies defendant the right even to make the objection that he was denied the equal protection of the laws, and any act, so interpreted, is in violation of the rights and guarantees afforded an accused under the Constitutions of the United States and of the State of Louisiana.

7. That defendant did not have any attorney representing him until one was appointed by this Honorable Court, notice of which said appointment was not received by the attorney until the third judicial day following the expiration of the term of the Grand Jury which indicted defendant, and a second attorney was appointed on the 4th judicial day following the expiration of the Grand Jury term; that defendant was scheduled for arraignment on the 5th judicial day following the expiration of the Grand Jury term, and filed his motion to Quash before the indictment was read and before any plea could be made, although defendant, through his attorneys, incorrectly stated in his Motion to Quash that he was filing and urging same ". . . having heard the indictment read and protesting he is not guilty."

8. That the law is not unreasonable; that it is unreasonable to expect counsel, one of whom was appointed by the Court on the third judicial day following the expiration of the term of the Grand Jury which indicted defendant, and the other of whom was appointed on the fourth judicial day following the expiration of the
32-37 Grand Jury term, to file a Motion to Quash within the three day period provided for in Criminal Code of Procedure Article 202, as urged by the District Attorney.

(Signed) GERARD H. SCHREIBER,
GEORGE H. FUST,
Counsel for defendant.

Duly sworn to by John J. Michel; jurat omitted in printing.

38-67 [File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

MOTION TO PERPETUATE TESTIMONY AND DENIAL THEREOF—Filed April 22, 1953

Now into this Honorable Court comes John Michel, defendant herein, and having heard the Court sustain the State's Demurrer to defendant's Motion to Quash, and having excepted and objected to said ruling, moves that the Court at this time allow defendant to produce witnesses and perpetuate their testimony in support of defendant's Motion to Quash.

WHEREFORE, the said John Michel prays that this Motion to Perpetuate Testimony be sustained.

(Signed) GERARD H. SCHREIBER,
GEORGE H. FUST,
Attorneys for Defendant.

Duly sworn to by John J. Michel; jurat omitted in printing.

April 22, 1953.

In view of my previous ruling on the Demurrer filed by the State of Louisiana, the motion is denied.

(Signed) NIELS F. HERTZ,
Judge.

68 [File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

MOTION FOR A NEW TRIAL—Filed July 6, 1953

69 And now into court comes John Michel, Defendant herein, through Gerard H. Schreiber and George Fust, Attorneys for Defendant, and moves the Court that the verdict of the jury be set aside and a new trial ordered, for the following reasons, to-wit:

I

That the verdict of the jury is contrary to the law and the evidence and is to the prejudice of the defendant.

II

That the evidence offered by the State was inconclusive and failed to prove beyond a reasonable doubt that the Defendant, John Michel, was guilty of the crime for which he had been indicted.

III

That the allegations and affirmations contained in the pleadings previously filed in connection herewith, together with the objections urged and errors complained of in the course of the trial, conclusively show that the defendant should be granted a new trial, which pleadings and objections are realleged and made part of this motion as fully as though copied herein in extenso.

WHEREFORE, your Defendant prays that, after due proceedings had, the verdict of the jury be set aside and a new trial ordered herein.

(Signed) GERARD H. SCHREIBER,
GEORGE H. FUST,
Attorneys for Defendant.

Duly sworn to by John Michel; jurat omitted in printing.

70 July 6, 1953.

Let the District Attorney show cause on the 13th day of July, 1953, at 10:30 o'clock A.M., why the relief prayed for should not be granted.

(Signed) NIELS F. HERTZ,
Judge.

July 13, 1953.

The motion for a new trial is overruled.

(Signed) NIELS F. HERTZ,
Judge.

[File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

MOTION IN ARREST OF JUDGMENT—Filed July 6, 1953

And now, after verdict against John Michel, and before sentence, comes the said John Michel, appearing herein through Gerard H. Schreiber and George Fust, Attorneys at Law, and moves the Court here to arrest judgment herein, and not to pronounce the same because of manifest errors in the record appearing, to-wit:

I

That this Court is without authority to sentence your defendant for all of the reasons set forth, alleged and affirmed in the Motion to Quash, the Answer to the Demurrer filed by the State, and other pleadings filed herein in connection with this cause, which your defendant makes a part hereof, together with the evidence taken thereon, as fully as though set out herein in extenso.

71

II

That for these reasons and all of the other reasons set forth and alleged in the preliminary motions filed and the bills of exception reserved during the trial, that this Court cannot now legally sentence your defendant.

WHEREFORE, your defendant prays that their motion be considered and that no judgment against him, the said John Michel, can be lawfully rendered on said record.

(Signed) GERARD H. SCHREIBER,
Attorney for Defendant.
GEORGE H. FUST,
Attorney for Defendant.

Duly sworn to by John Michel, jurat omitted in printing.

July 6, 1953.

Let the District Attorney show cause on the 13th day of July 1953, at 10:30 o'clock A. M., why the relief prayed for should not be granted.

(Signed) NIELS F. HERTZ,
Judge.

July 13, 1953.

The motion in arrest of judgment is denied.

(Signed) NIELS F. HERTZ,
Judge.

72 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS.
SECTION "F"

[Title omitted]

SUPPLEMENTAL MOTION FOR A NEW TRIAL—Filed November 2, 1953.

And now into Court comes John Michel, Defendant herein, through Gerard H. Schreiber and George H. Fust, Attorneys for the Defendant, and moves the Court that the verdict of the jury be set aside and a new trial ordered for the following reasons, to-wit:

I

That error was committed by this Honorable Court in overruling Defendant's Motion to Quash for the reasons that the Grand Jury which returned the indictment was impanelled in violation of the equal protection clause of the 14th Amendment of the Constitution of the United States, and the Civil Rights Act of the United States Congress which was enacted in pursuance of and for the purpose of carrying out the equal protection guarantee of said 14th Amendment, being 18 Stat. 336, 8 U.S.C. paragraph 44.

The Fourteenth Amendment to the Constitution of the United States reads:

> "No State shall . . . . . deny to any person within its jurisdiction the equal protection of the laws."

The Act of Congress quoted above reads:

> "No citizen possessing all other qualifications . . . . . shall be disqualified for service as grand or petit juror in any court of the United States or any State, on account of race, color, or previous condition of servitude."

In this connection, mover herein was, by the ruling of this Court, denied the right to prove to this Honorable Court the following facts which were alleged herein in our Answer to the Demurrer To the Motion to Quash, and which facts, under the case of Patton v. State of Mississippi, decided by the Supreme Court of the United States in 68 S. Ct. 184, makes out a prima facie case of the denial of the equal protection of the laws.

73 Defendant, through his counsel, was prepared, but was denied the right to show the following facts:

(1) That Defendant is a member of the colored race.

(2) That the three jury commissioners who set up the general venire and the Grand Jury Panel from which the Grand Jury

was selected which returned the indictment of defendant, plus all State officials in any way connected with the returning of the indictment are all white men and are members of the Caucasian race.

(3) That the twelve members of the Grand Jury which returned this indictment on February 19, 1953 are all white men and are of the Caucasian race.

(4) That no Negro has served on the Grand Jury for the Parish of Orleans for the past thirty years, with the exception of one man who served approximately sixteen years ago, by the name of Ruffin J. Walker, who, at the time of his acceptance on the Grand Jury was believed to be a white man due to his light color.

(5) That the population of the City of New Orleans or Parish of Orleans from which the jurors were chosen, according to the United States Department of Commerce, Bureau of Census, is divided as to negro and white, as follows, for the years indicated:

Year	White	Negro
1930	328446	129632
1940	344775	149034
1950	459400	227300

(6) That the number of registered voters of the City of New Orleans or Parish of Orleans was divided on the date indicated below, as follows:

Year	White	Negro
October 7, 1950	186866	26029
March 1, 1952	194794	25545

74 (7) That there is and has been for many years past a large number of colored males who can meet the qualifications fixed by law for grand jurors.

(8) That colored males have been serving in the Federal Courts in New Orleans on petit juries and grand juries for fifty years or more.

(9) That there has been one colored university in existence in the City of New Orleans since 1869, and that there have been at least two in existence since 1915.

(10) That there are four complete public high schools for colored; two junior high schools for colored; and four parochial high schools for colored, in the City of New Orleans and Parish of Orleans.

(11) That the colored public high schools in the City of New Orleans and Parish of Orleans have graduated over

5,200 students, and the colored parochial high schools have graduated over 800 students.

(12) That in 1952, in the elementary grades, there were 28,295 white students in schools for whites, and 25,896 colored students in schools for colored; that in 1942, in the elementary grades, there were 27,824 white students in schools for whites, and 20,612 colored students in schools for colored, all of these schools being public schools.

(13) That there are twelve or more insurance companies in the City of New Orleans exclusively owned and operated by colored persons.

(14) That there are more than forty colored physicians in the City of New Orleans, about one dozen colored dentists, and ten or more colored pharmacists; and that there have been two weekly colored newspapers owned and operated by colored personnel in the City of New Orleans for several years.

75 (15) That there is a colored hospital in the City of New Orleans, the staff of which is about evenly divided between colored and white doctors.

(16) That one of the insurance companies mentioned in (13) above has assets of over $2,000,000.00, and employs some two hundred colored persons in the operation of its business.

(17) Plus other facts, in addition to the ones listed in Nos. (1) through (16) above; to show that there has been intentional and/or systematic exclusion of negroes from grand juries in the Parish of Orleans, and the grand jury which returned the indictment against defendant.

That the above factual allegations are matters of common public knowledge in the City of New Orleans and Parish of Orleans, and are matters of specific knowledge to your Honor and the other judges of the Criminal District Court for the Parish of Orleans because said factual matters have been established by judges in these Courts in several similar instances, particularly, in State v. Cargile, No. ————, of the Docket of this Honorable Court; State v. Green, No. ———— of the Docket of this Honorable Court; and State v. Dowels, No. ———— of the Docket of this Honorable Court; in which cases the judges of this Honorable Court have been called as witnesses, and have testified to some of the facts alleged hereinabove.

That with reference to the fact that no negro has ever been selected in the Parish of Orleans to serve on the Grand Jury, including the Grand Jury which returned the indictment herein, and the fact that there are a large number of negro citizens in the Parish of Orleans qualified to serve as jurors, on December 8, 1947, the

United States Supreme Court, in Patton v. State of Mississippi (supra), stated:

> "When a jury selection plan, whatever it is, operates in such ways as always to result in the complete and long-continued exclusion of any representation at all from a large group of negroes, or any other racial group, indictments and verdicts returned against them by juries thus elected cannot stand."

76 Counsel for Defendant were denied the right to show that there has been "complete and long-continued Exclusion of any representative at all from a large group of negroes" by your Honor; that your Honor in making said ruling followed the case of State v. Wilson, 204 La. 14 So. (2) 873; that said decision of the Supreme Court of the State of Louisiana is a denial of the equal protection clause because it denied the Defendant the right of proving a prima facie case of systematic exclusion of negroes from Grand Juries in the Parish of Orleans.

Our Supreme Court has frequently said:

> "Suffice it to say that the Supreme Court of the United States has declared in substance, that equal protection of the law requires that a colored person shall be afforded an opportunity to have members of his race serve upon the grand and petit jury in cases involving his life or liberty, and, therefore, any denial of this guarantee, either by a law which does not provide a fair mode of selection or by officers who systematically administer a valid law so as to accomplish gross inequalities, cannot be countenanced." State v. Perkins, 211 La. 998, 31 So. (2) 188.

Here we have a case where no colored man has ever served on a Grand Jury in the Parish of Orleans with the exception of one colored man who looked like a white man, and who was placed on the Grand Jury under the mistaken belief that he was a white man.

In State v. Perkins (supra), our Supreme Court further stated:

> "A legion of cases involving alleged racial discrimination in selection of grand and petit juries are to be found in the jurisprudence of the Supreme Court of the United States and this Court. These adjudications have settled all legal problems here presented and they have been many times cited and discussd by us in kindred matters."

With all honor and sincerest deference to our Supreme Court of Louisiana, counsel for mover herein respectfully avers that the decision of our Supreme Court in the case of State v. Wilson, supra, is a violation of the equal protection clause of the Fourteenth

Amendment and the Civil Rights Act of Congress enacted thereunder, and said decision, upon which your Honor has predicated his ruling sustaining the demurrer of the State to the Defendant's Motion to Quash, deprives mover of the equal protection of the laws of the State of Louisiana and of the United States, and
77 that said decision is an unreasonable and unwarranted and arbitrary interpretation of a State law.

To be specific, while it is a notorious and undisputed fact that with the exception of the one occasion that a negro who appeared to be a white man and was appointed on the Grand Jury because he was mistaken for a white man, no negro has ever served or been selected to serve on the Grand Jury in the Parish of Orleans, including the Grand Jury which indicted mover; and while it is also a fact of public knowledge that a very large percentage of the population of the Parish of Orleans are colored citizens of the State and of the United States, and are qualified for service on Grand Juries, no negro has ever served or been selected except as hereinabove alleged.

And while repeated decisions of the United States Supreme Court have determined that the above notorious and undisputed facts make out a prima facie case against the constitutionality of the Grand Jury which indicted mover herein, said decision of our Supreme Court in State v. Wilson, supra, deprives mover, and has up to now deprived mover of his right to put into the record of this case the aforesaid undisputed and notorious facts which the Supreme Court of the United States has held, repeatedly, as stated, makes out a prima facie case of the deprivation of mover's right to the equal protection of the laws of the State of Louisiana and of the United States, and establishes the nullity of the indictment upon which mover has been tried and convicted.

Continuing with our specifications, counsel for mover respectfully cite the statute at issue in said State v. Wilson, supra:

> "All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard." Article 202, Code of Criminal Procedure.

78. In said case our Honorable Supreme Court ruled that the aforementioned Article No. 202 of the Louisiana Code of Criminal Law and Procedure was applicable to grand jury panels as well as to petit jury panels. We respectfully submit that it is unreasonable to attempt to extend this statute as it is written

403 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

PER CURIAM TO BILL OF EXCEPTION No. 41—Filed November 9, 1953

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of Louisiana:

May it please the Court:

I overruled the supplemental motion for a new trial and give as my reasons the same reasons contained in my per curiam to bill of exception No. 1.

New Orleans, Louisiana,
November 9, 1953, 9:30 A.M.

Respectfully,

(S.) NIELS F. HERTZ,
Judge.

[File endorsement omitted]

[File endorsement omitted]

404 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS,

[Title omitted]

BILL OF EXCEPTION No. 42—Filed November 3, 1953

Annexed:

Motion to Quash .....
Answer to Demurrer .....
Testimony taken on Answer to Demurrer .....

BE IT REMEMBERED that after verdict in the above entitled and numbered cause, and before sentence, your defendant, JOHN MICHEL, did file a Motion in Arrest of Judgment, which said Motion reads as follows:

Motion in Arrest of Judgment Omitted.

Printed side page 70 ante

405 WHEREUPON, the Court having overruled the motion, your defendant did then and there reserve a bill of exceptions, making the motion, the Court's ruling on the motion, the Motion to Quash filed by your defendant, the Answer to the Demurrer, the

testimony taken on the Answer to the Demurrer, part of the bill. And now showing that there was error to the prejudice of your defendant in the ruling of the Court, denying the Motion in Arrest of Judgment, your defendant presents this his formal Bill of Exception for signature.

New Orleans, Louisiana,
November 9, 1953, 9:00 A.M.

(S.) NIELS F. HERTZ,
Judge.

406-542 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F".

[Title omitted]

PER CURIAM TO BILL OF EXCEPTION NO. 42—Filed November 9, 1953

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of Louisiana:

May it please the court:

Counsel for the accused in his motion in arrest of judgment cites no other reasons than these already discussed in his motion for a new trial and other bills of exceptions, so accordingly, I denied the motion in arrest of judgment.

New Orleans, Louisiana,
November 9, 1953, 9:30 A.M.

Respectfully,

(S.) NIELS F. HERTZ,
Judge.

[File endorsement omitted]

543 IN THE SUPREME COURT OF LOUISIANA

No. 41,632

STATE OF LOUISIANA

vs.

JOHN MICHEL

Appeal from the Criminal District Court, Parish of Orleans, Section "F"—Honorable Niels F. Hertz, Judge.

OPINION—May 31, 1954

McCALEB, Justice.

On the night of February 10th 1953, appellant, a nineteen year old Negro, waylaid two fifteen year old white girls, who were returning

to grand jury panels *because the grand jury serves for six months;* and because the crime for which the grand jury may return the indictment may not have been committed until thirty or sixty days *after* the grand jury had commenced its six months term of service and, consequently, it would be physically impossible for the person so indicted to attack the grand jury panel within or "before the expiration of the third judicial day" because, as stated, the crime was not committed until thirty or sixty days after the grand jury was empanelled. Consequently, in order to make this statute applicable to a grand jury panel, our Supreme Court was compelled to rule that this statute which says, "All objections to the manner of selecting or drawing any juror or jury . . . must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn. . . ." intended to say, "All objections . . . must be urged . . . before the expiration of three judicial days *after* the expiration of the term of the grand jury." Counsel for mover respectfully assert that such an interpretation is without warrant in law or reason as it deprives mover of his rights under the Fourteenth Amendment and Civil Rights Act, and that it is an unconstitutional decision.

WHEREFORE, your Defendant prays that, after due proceedings had, the verdict of the jury be set aside and a new trial ordered herein.

(Signed) GÉRARD H. SCHREIBER,
Attorney for Defendant.
GEORGE H. FUST,
Attorney for Defendant.

79 *Duly sworn to by John Joseph Michel, jurat omitted in printing.*

November 3, 1953.

Supplemental Motion for a New Trial denied.

(Signed) NIELS F. HERTZ,
Judge.

[File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

MOTION FOR APPEAL AND ORDER THEREON—Filed November 9, 1953

And now into open Court comes the defendant, John Michel, through undersigned Counsel, and on suggesting to the Court that the record herein shows error to his prejudice and that he is de-

sirous to appeal to the Honorable The Supreme Court of the State of Louisiana.

WHEREFORE, he prays that he be granted a suspensive appeal to The Honorable the Supreme Court of the State of Louisiana, returnable in accordance with law.

(Signed) JOHN JOSEPH MICHEL.

80 GEORGE H. FUST,
Attorney for Defendant.

ORDER

Let a suspensive appeal in this case on behalf of the defendant, John Michel, to the Supreme Court of the State of Louisiana, and let the return date be the 4th day of January 1954, at 10:35 A.M. and pending said appeal let the defendant be incarcerated in the parish prison without bail.

New Orleans, Louisiana,
November 9th 1953.

(Signed) NIELS F. HERTZ,
Judge.

81 [File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

BILL OF EXCEPTION No. 1—Filed November 3, 1953

BE IT REMEMBERED that before answering to the bill of Indictment in the above numbered and entitled cause, JOHN MICHEL on March 9th., 1953, did file a Motion to Quash the Indictment, which said Motion reads as follows:

"Motion to Quash Omitted. Printed side page 24 ante

82 BE IT FURTHER REMEMBERED that on March 23rd 1953, the State of Louisiana through the District Attorney for the Parish of Orleans, did file a Demurrer to the foregoing Motion to Quash which said Demurrer reads as follows:

"Answer and Demurrer to Motion to Quash Omitted. Printed side page 26 ante.

83-86 BE IT FURTHER REMEMBERED that on March 30th 1953, your defendant, JOHN MICHEL, did file an answer to the foregoing Demurrer of the State of Louisiana, which answer reads as follows:

"Answer to Demurrer Omitted. Printed side page 28 ante.

87 BE IT FURTHER REMEMBERED that on March 30th 1953, on motion of the defense in support of their answer to the State's Demurrer, the following testimony was taken:

Testimony Adduced on March 30th 1953 on Demurrer

GERARD H. SCHREIBER, who was sworn as a witness on motion of the defense, testified as follows:

DIRECT EXAMINATION.

Mr. FUST:

Q. Were you once connected with the district attorney's office of the city of New Orleans?

A. Yes, I was.

Q. When was that?

A. Well, I resigned in—I think, September 1st 1952. I was appointed sometime in the middle part of 1950, approximately two and one half years.

Q. That was during the term of the present district attorney?

A. Yes.

Q. What was your experience in connection with motions to quash in criminal cases; that you handled?

A. In what respect?

Q. Were there any motions to quash filed in cases during the period you were in the district attorneys office where the motions were filed sometime after the term of the grand jury which indicted those defendants expired?

A. Yes, there was.

Q. I hand you a record here in the Alfred Dowl case, number 139-324. I hand you the record in the case and ask you to tell the Court what date during the proceedings was the motion to quash filed in that case?

A. Well, the indictment shows that Alfred Dowl was indicted July 10th 1952, that was the grand jury for March 2nd 1952 through September 2nd 1952. The indictment further shows he was arraigned August 29th 1952, which was approximately one month plus nineteen days after the true bill was returned by the grand jury.

88 The COURT:

Q. That is not after the grand jury left office?

A. Yes, the grand jury would have gone out of office September 2nd 1952, I say, he was arraigned on August 29th which was one month and 19 days.

The record further shows, rather the indictment shows on September 11th 1952, the Court appointed J. L. McCain, attorney at law, to represent the defendant Albert Dowl. That was approximately seven days after that grand jury went out of office. At the time of his appointment McCain stated he would file pleadings on September 16th 1952. The record shows, the indorsements to the indictment shows that on September 16th 1952, the defendant filed a motion to quash which was fixed for argument September 29th 1952, rather fixed for trial on that date.

Mr. Fust:

Q. Did the State object to the filing of that motion to quash?

A. There is no record of it, of the State having filed a demurrer to that motion to quash.

Q. And that motion to quash was filed September 16th and the grand jury term ended on September 2nd?

A. That is correct.

Q. I will hand you the file in the case of State v. Robert Green, Jr., number 136-991. I will ask you to tell the Court what the record reflects in this matter insofar as to the stage of the proceedings at which the motion to quash was filed?

A. This record shows Robert Green was indicted August 23rd 1951. That would be the grand jury that was impaneled to serve from March 2nd 1951 through September 2nd 1951. The indorsement to the indictment shows that the defendant was arraigned September 6th 1951, which was four days after the grand jury that had indicted him their term had expired. The record shows, the indorsement to the indictment shows that on March 19th 1952, the court permitted——

89 The Court:

Q. What date?

A. March 19th 1952, which was six months plus some days after the grand jury went out of office, that on motion of counsel for defendant, that the Court ordered the plea of not guilty be withdrawn in order to file a motion to quash. In other words this record shows that motion to quash was filed six months and approximately nineteen days after the grand jury term had expired.

Mr. Fust:

Q. Does the record show whether the State through the district attorney objected to the filing of a motion to quash?

A. The record does not show any demurrer to this motion to quash.

Q. What section of the Court did that case arise in?

A. Robert Green, Section "B".

Q. What section of the Court did the Dowl case arise in?

A. Section "A".

Q. I hand you the record in the case at bar and ask you to tell the Court at what stage of the proceedings was the motion to quash filed herein?

A. This indictment shows it was returned as a true bill on February 19th 1953. That would be the grand jury that was impaneled to serve from September 2nd 1952 through March 2nd 1953, and it shows that on February 23rd 1953, the defendant was called up for arraignment, that was approximately only two judicial days after the defendant was indicted. As a matter of fact that was the second judicial day after the defendant was indicted, and the indorsement to the indictment shows the arraignment was continued to March 2nd 1953. The indorsement to the indictment shows that on February 23rd the arraignment was continued in order to grant to the defendant until March 2nd 1953 to employ counsel. The next indorsement to the indictment shows that the Court ap-

90 pointed me to represent the defendant on March 2nd 1953, that would have been on the day the term of the grand jury had expired, and set the arraignment for March 9th 1953. On March 9th 1953, the record shows that the instant motion to quash was filed.

Q. In other words the motion to quash was filed on the fifth judicial day that followed the expiration of the term of the grand jury that indicted this defendant?

A. That is correct.

Q. As a matter of fact, when did you receive your official notice of your appointment?

The Court: Before he answers that, I want to state that we discussed this appointment before he received his official appointment from the court.

Mr. Fust:

Q. When did you actually receive your official notice of appointment?

A. I received the official notice of the appointment on March 5th 1953.

Q. Had the Judge of this honorable court discussed the possibility of an appointment with you before that time?

A. Yes, that is correct.

Q. Tell us the facts surrounding the appointment?

A. Judge Hertz had discussed the case with me, not the case, but the question of me being appointed and asked me would I take the case, etc., and I told him, yes, that I would take the case, and he told me he was going to appoint an attorney or several attorneys to assist in the defense of this defendant.

Q. Was that after the defendant had been brought up for arraignment the second time?

A. I think it was the same day. As a matter of fact, I think March 2nd I was in court on another matter at the time; I was not in here to represent this defendant, I had another matter coming up. I was in court when the defendant was called and shortly after that Judge Hertz discussed my appointment with him.

91 CROSS-EXAMINATION

Mr. GULOTTA:

Q. According to your recollection when was it—when was the first time or day Judge Hertz discussed with you your appointment to represent the accused in this case?

A. I don't know the first day Mr. Gulotta, because the time was such a short period of time I can't remember the exact day. However, I do remember I was in court on March 2nd when this arraignment was called. I remember that because at that time I spoke to the boy's aunt and told her, after Judge Hertz discussed this with me, I told him yes. I remember his aunt was here and I told his aunt I would discuss it with her.

Q. In other words Judge Hertz discussed with you prior to March 2nd, your appointment?

A. He discussed it with me the appointment.

Q. Can you give me any idea about how many times it was that Judge Hertz discussed your appointment in this case?

A. I have no idea.

Q. Approximately?

A. I have no idea, as I say, I distinctly remember discussing it with him March 2nd. As to preliminary discussions taking place or anything like that, I have no idea, but there was never any appointment in this case prior to March 2nd. I would say not confirmed appointment that what I mean.

Q. In other words as I understand, your recollection is hazy as to whether or not Judge Hertz spoke to you prior to March 2nd?

The COURT: My recollection is not hazy. Do you want me to tell you?

92 Mr. GULOTTA: That's what I want, yes, sir.

The COURT: I might say I discussed the appointment with several other attorneys before discussing it with Mr. Schreiber and in view of the fact this is a capital case requiring representation by a lawyer who has five years experience at the bar I had quite some difficulty in getting a lawyer of that practice. I discussed the matter cursory with Mr. Schreiber right after the date of the first arraignment which was February 23rd. The defendant appeared in court without an attorney for arraignment and I asked him if he was going to employ counsel, informing him he was charged with an offense if convicted of, he would have to be assigned to the electric chair. He said his people were going to get a lawyer and I told him if he didn't have a lawyer the next time the case was fixed, I would appoint a lawyer for him. Some colored woman who represented herself as his aunt came to see me March 2nd. I discussed the matter with Mr. Schreiber in the meantime, in the event they did not employ a lawyer, and asked him would he be willing to represent the defendant and help the court out. On another occasion I told him I had not heard from those people and asked him would he still be willing to represent the man, I don't remember the time, that was between the first discussion and March 2nd, and told him in the event he accepted the appointment I would appoint another lawyer because the case was a capital case. I felt he was trying to help me out. On the second, he was in the courtroom and the defendant was called up and I called the aunt, this woman informed me she was unable to get a lawyer for him and I told her, very well, I would appoint Mr. Schreiber. He said, Judge, give me an opportunity to look it over and continue the matter for one week, is that correct?

93 Mr. SCHREIBER: I don't think I had that much to say. As a matter of fact I recall my sitting on the bench and you spoke to me from the bench and asked me would I accept the appointment.

The COURT TO LOUISE DESVIGNES: On the first time you spoke to me, this man came up for arraignment and I continued it for him to get a lawyer, do you remember that?

A. I do.

The second time, March 2nd 1953, you came in and told me he could get a lawyer. Did I call you up and introduce you to Mr. Schreiber and tell you, this is the lawyer I appointed?

A. Yes, sir.

The COURT: That same day March 2nd, you said to me, Judge, if you don't mind, I don't know anything about the case, would you mind continuing the arraignment to give me

an opportunity to look over the record. I said, yes one week, because I would like to try this case before my vacation.

Mr. SCHREIBER: I would have to take exception to my asking for a continuance on March 2nd.

The COURT: I continued it.

Mr. SCHREIBER: I would like to say in reference to that that I did not consider myself to be officially appointed in this case until I received official notice from the court of my appointment. As I say, up to that time the appointment was hazy, there was several attorneys to be appointed in the case, that I did not consider myself officially appointed until March 5th and that I took no action in the case until that time.

94 The COURT: I distinctly remember that I called the aunt and told her you were one of the lawyers I had appointed in the case. I remember distinctly it was March 2nd. I appointed you in the case.

GEORGE H. FUST, who was sworn as a witness on motion of the defense, testified as follows:

DIRECT EXAMINATION

Mr. SCHREIBER:

Q. State your name?
A. George H. Fust.
Q. What is your occupation?
A. Attorney.
Q. Are you one of the attorneys that has been appointed by the court to represent John Michel?
A. Yes, I am.
Q. I hand you the record in the case of State vs. John Michel, 141-241, and I ask you what does the record show with reference to your appointment?
A. The record is silent with reference to my appointment, however, I can explain the circumstances surrounding my appointment.
I walked into Judge Hertz' court on Friday March 6th on another matter and at that time Judge Hertz asked me if I would accept an appointment to represent the defendant in this case and said that he had already appointed you, Mr. Schreiber, in the same matter.

The COURT: With all due respect to you Mr. Fust, I appointed you to assist him, not to represent him.

Mr. FUST: That is correct.

95 Judge Hertz explained at that time that I was to accept that as my official appointment and that he would not go through the routine of having the clerk's office mail me a notice of my appointment.

The COURT: Could you be mistaken, was it on the 3rd?

Mr. FUST. No, sir, I could not.

Mr. GULOTTA: No questions.

Mr. SCHREIBER: In connection with the testimony of Mr. Fust, we would like to offer in evidence the indictment in the Robert Green case, 136-991, allotted to Section "B" of this Court, and the case of Alfred Dowl, 139-324, allotted to Section "A" of this court, and the indictment in the instant case of John Michel, 141-241, allotted to "F".

Mr. GULOTTA: I would like to offer also in evidence, the indorsements on the indictments you offer.

Mr. SCHREIBER: I presumed I was offering them.

The COURT: The Court will take the matter under advisement with the understanding that counsel for both sides will submit briefs and the decision will be rendered Wednesday April 8th."

96 BE IT FURTHER REMEMBERED that on April 8th 1953, the Court ruled sustaining the Demurrer of the State of Louisiana and dismissed the defendant's Motion to Quash the Indictment, to which ruling your defendant did then and there in open court, object and the same being overruled by the Court, did then and there reserve this Bill of Exceptions making part thereof the motion to quash, Demurrer and Answer to Demurrer, and the testimony taken on the answer to the Demurrer, part of this Bill of Exceptions, which Bill of exceptions your defendant now files and presents for signature.

New Orleans, Louisiana,
November 9, 1953, 9:00 A.M.

(Signed) NIELS F. HERTZ,
Judge

97 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

PER CURIAM, TO BILL OF EXCEPTION NO. 1—Filed November 9, 1953

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of Louisiana.

May it please the court:

I sustained the demurrer of the State of Louisiana and dismissed the motion to quash the indictment because the said motion to quash was filed more than three judicial days after the expiration of the grand jury term of the Grand Jury that indicted the defendant herein. The minute entries of this court will show that the Grand Jury that indicted the defendant herein went into office on the 2nd day of September 1952 and the term of the said Grand Jury expired on March 2nd 1953; that the motion to quash the indictment filed herein was filed on the 9th day of March 1953, more than three judicial days after the expiration of the grand jury term of the Grand Jury that indicted the defendant herein. Under the provisions of Revised Statute 14:202 "any objection to the manner of selecting or drawing a Grand Jury, any defect or irregularity in impaneling or selection of a Grand Jury, must be urged before the expiration of three judicial days after the said grand jury term expired, or before entering upon the trial of the case if it be done sooner."

This question has been previously and extensively discussed by the Supreme Court of the State of Louisiana in the case of State v. Wilson, reported in 14 So. 2d 873, where the same question was presented. In that case the trial judge sustained the de-
98 murrer filed by the State and dismissed the motion to quash as I have done in this case, and his ruling was affirmed by the Louisiana State Supreme Court.

Respectfully,

(S.) NIELS F. HERTZ,
Judge

New Orleans, Louisiana,
November 9, 1953, 9:30 A.M.

[File endorsement omitted]

99 [File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

BILL OF EXCEPTION No. 2—Filed November 3, 1953

Annexed:

Motion to Quash, made part of and copied in Bill of Exceptions No. 1, ...

Answer and Demurrer to Motion to Quash made part of and copied in Bill of Exceptions No. 1, ...

Defendant's Answer to Demurrer, made part of and copied in Bill of Exception No. 1, ...

Testimony adduced in support of defendant's answer to State's Demurrer, made part of and copied in Bill of Exceptions No. 1, ...

BE IT REMEMBERED that before answering to the Bill of Indictment in the above numbered and entitled cause, your defendant did file a Motion to Quash the Indictment herein, which motion is copied in and made part of Bill of Exceptions No. 1, and which motion is annexed hereto and made part hereof as if set out in extenso herein.

BE IT FURTHER REMEMBERED that on March 23rd 1953, the State of Louisiana through the District Attorney, did file a Demurrer to the defendant's Motion to Quash, which Demurrer is copied in and made part of Bill of Exceptions No. 1, and which Demurrer is annexed hereto and made part hereof as if set out in extenso herein.

BE IT FURTHER REMEMBERED that on March 30th 1953, your defendant did file an Answer to the State's Demurrer, which Answer is copied in and made part of Bill of Exceptions No. 1, and which Answer is annexed hereto and made part hereof as if set out in extenso herein.

BE IT FURTHER REMEMBERED that on March 30th 1953, on motion of your defendant, testimony in support of defendant's answer to the State's Demurrer was taken, which testimony is copied in and made part of Bill of Exceptions No. 1, and which testimony is annexed hereto and made part hereof as if set out in extenso herein.

BE IT FURTHER REMEMBERED that on April 8th 1953, the
100 Court ruled, sustaining the Demurrer of the State and dismissing defendant's Motion to Quash.

BE IT FURTHER REMEMBERED that then and there your defendant did move to be allowed to present and perpetuate his evidence in support of his Motion to Quash.

BE IT FURTHER REMEMBERED that your defendant's Motion was denied, to which ruling your defendant did then and there reserve this Bill of Exceptions, making part thereof the defendant's Motion to Quash, the States Answer and Demurrer, the defendant's Answer to the States Demurrer, and the testimony in support of the defendant's Answer to the State's Demurrer, part of the bill. And there being error to the prejudice of your defendant, your defendant now files this his formal Bill of Exceptions and presents same for signature.

New Orleans, Louisiana,
November 9, 1953, 9:00 A.M.

(S.) NIELS F. HERTZ,
Judge.

101-391 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

PER CURIAM TO BILL OF EXCEPTION NO. 2—Filed November 9, 1953

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of Louisiana:

May it please the court:

I denied defendant's motion to perpetuate testimony in support of his motion to quash because, as stated in my per curiam to bill of exception No. 1, I denied the motion to quash because of the untimeliness of its filing. Although counsel for the defendant seems not to make it a serious issue, however, testified that he was appointed by me to represent the defendant on March 5th 1953. Such is not the case and the record will show that I appointed him to represent the defendant on March 2nd 1953, and the motion to quash was filed by him on March 9th 1953, more than three judicial days after the expiration of the grand jury term which took place on March 2nd 1953. At no time during the intervening time between March 2nd and March 9th did counsel file any motion asking for delay for the purpose of filing any special pleadings. Counsel admitted in answer to a question by me while testifying that I notified him in open court on March 2nd 1953 of the appointment (after he had informed me that he was willing to and would represent the defendant) but stated that he did not consider the appointment official until he was given a written notice from the clerk's office. As I stated previously counsel for the defendant does not seem to seriously consider this difference but nevertheless I

deem it advisable to call it to the attention of the Louisiana State Supreme Court.

New Orleans, Louisiana,
November 9, 1953, 9:30 A.M

Respectfully,

(S.) NIELS F. HERTZ,
Judge.

[File endorsement omitted]

392 [File endorsement omitted]

[Title omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

BILL OF EXCEPTION No. 40—Filed November 3, 1953

Annexed:

Motion to Quash .....
Answer to Demurrer to Motion to Quash .....
Answer to Demurrer .....
Motion to perpetuate testimony .....
Motion for Bill of Particulars .....
Pray for Oyer .....
Motion for Supplemental Bill of Particulars .....
Application for Writ of Subpoena Duces Tecum .....

BE IT REMEMBERED that after verdict in the above entitled and numbered cause, and before sentence, your defendant JOHN MICHEL, did file a motion for a new trial, which said motion reads as follows:

Motion for a New Trial Omitted.

Printed side page 68 ante

393 WHEREUPON, the Court having overruled the motion, your defendant did in open court, reserve a bill of exception, making the motion, the Court's ruling on the motion, the pleadings filed by defendant, the Court's ruling on the pleadings, and the objections urged by the defendant, the Court's ruling on the objections, the motions made by defendant, the Courts ruling on the motions in the course of the trial, and the bills of exception reserved thereon, part of the bill. And now showing that there was error to the prejudice of your defendant, in the ruling of the Court denying the motion for a new trial, your defendant presents this his bill of exception for signature.

New Orleans, Louisiana,
November 9, 1953, 9:00 A.M.

(signed) NIELS F. HERTZ,
Judge.

394 IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

PER CURIAM TO BILL OF EXCEPTION No. 40—Filed November 9, 1953

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of Louisiana:

May it please the court:

I overruled the motion for a new trial because I believe the verdict of the jury should not be disturbed. Briefly, the facts are these: A young white girl, Estelle Schneider, age 15, accompanied by a friend of hers, Rosemary Misuraca, were walking from a bus stop on the date of the alleged crime when they were confronted by the accused John Michel, a Mulatto, who first robbed both of them of certain jewels and then later raped one of them named Estelle Schneider. The young girl during the trial identified the accused as the person that committed the attack upon her. Shortly after the commission of the alleged offense the accused was arrested and made a confession. In the confession he stated to members of the police department that he had turned the jewelry that was taken from the two girls at the time of the attack over to a friend of his by the name of Albert Pierre. Following this lead the police officers contacted Albert Pierre who readily admitted that he had the jewelry in his possession which was turned over to him by the accused and he surrendered it to the police. The said Albert Pierre later testified during the trial to that effect. He likewise identified the jewelry and also identified the accused as a friend of his of long standing. The petit jury was out a very short time and returned a verdict of "guilty as charged" which was received and recorded in the minutes of this court. I believe that the verdict should not be dis-
395 turbed, that the case as made out by the State,—the accused did not take the stand, was clear and convincing beyond a reasonable doubt of the guilt of the accused. I therefore denied the motion for a new trial filed by the accused.

New Orleans, Louisiana,
November 9, 1953, 9:30 A.M.

Respectfully,

(Signed) NIELS F. HERTZ,
Judge.

396-401 [File endorsement omitted]

IN THE CRIMINAL DISTRICT COURT, PARISH OF ORLEANS, SECTION "F"

[Title omitted]

BILL OF EXCEPTION No. 41—Filed November 8, 1953

Annexed:

Motion to Quash .....
Demurrer to Motion to Quash .....
Defendant's answer to Demurrer .....
Supplemental Motion for New Trial .....

BE IT REMEMBERED that on the trial of the above entitled and numbered cause, and before sentence, your defendant filed with the Court, the following Supplemental Motion for a New Trial:

Supplemental Motion for a New Trial Omitted.

Printed side page 72 ante

402 WHEREUPON, the Court having overruled the motion, your defendant did in open court object to same, and his objection having been overruled, did reserve a bill of exceptions, making the motion to quash, the demurrer of the State, and the defendant's answer to the demurrer, the supplemental motion for a new trial and the ruling of the Court thereon, part of the bill. And now showing that there was error to the prejudice of your defendant in the ruling of the court, your defendant presents this his bill of exceptions for signature.

New Orleans, Louisiana,
November 9, 1953, 9:00 A.M.

(Signed) NIELS F. HERTZ,
Judge.

to their homes in New Orleans after witnessing a carnival parade, and, while holding them captive with an open blade knife, robbed them of their meagre possessions, a wrist watch, two rings and a gold cross. After taking this jewelry, he released one of the girls but commanded the other to walk with him to a nearby secluded spot in the area of St. Bernard Avenue, where he forced her, by threats against her life, to perform an unspeakable and degrading carnal act upon his person and thereafter proceeded to rape her three times. He was indicted for aggravated rape on February 13th 1953 and subsequently was tried and convicted of the offense, being sentenced to death by electrocution. He is appealing from his conviction and sentence, relying on 42 bills of exceptions for a reversal.

The first and second bills of exceptions may be considered together, as the complaint in the second is dependent upon whether the first bill is well founded. That bill was reserved to a ruling of the trial judge denying a motion to quash the indictment. In his motion, appellant challenged the validity of the indictment, contending that negroes had been systematically excluded from the general venire from which the Grand Jury returning the indict-
544 ment was selected, in violation of the rights guaranteed to him by the Federal and State Constitutions. The State demurred to the motion to quash on the ground that it had not been filed within the time prescribed by law. The judge sustained the demurrer holding that, since the motion to quash had not been filed within three judicial days from the expiration of the term of the Grand Jury, which had returned the indictment, it could not be considered in view of the provisions of Article 202 of the Code of Criminal Procedure, as interpreted by this court in State vs. Wilson, 204 La. 24, 14 So. (2d) 873.

The record shows that the Grand Jury that indicted appellant was impanelled on September 2nd 1952 and that its term expired on March 2nd 1953. Appellant's motion to quash was filed on March 9th 1953, seven days after the term of the Grand Jury ended.

Article 202 of the Code of Criminal Procedure (now R. S. 15:202) provides:

> "All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged *before the expiration of the third judicial day of the term for which said jury shall have been drawn*, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard." (Emphasis ours.)

In State vs. Wilson, supra, the court was called upon to construe the foregoing provision—precisely, to ferret out the meaning in-

15.

That petitioner was indicted February 19, 1953 and, consequently, petitioner could not attack the grand jury venire or array "Within the third judicial day of the term for which said grand jury was drawn;" that any attempt made by Your Honors to apply this statute to the Grand Jury is an attempt to do the impossible and, if persisted in, must necessarily result in making the statute declare something which the statute does not declare.

16.

That petitioner emphatically asserts that he has the utmost respect for the wisdom and integrity and good faith of Your Honors and makes the assertions herein in what he considers a fair and reasonable discussion of a point of law, and with all proper deference.

17.

Petitioner points to the decision of Your Honors in the case of State vs. Wilson, 204 La. 24, 14 So. (2nd) 873, in which matter Your Honors were called upon to interpret and apply said statute R. S. 15:202, cited above, in a Motion to Quash an indictment, and to the fact that immediately notable about said Wilson decision is its great length and effort and, secondly, the dissent of the then Chief Justice of the Louisiana Supreme Court, completely and categorically disagreeing with the majority opinion; and to the fact that the trial court, in the instant case, in sustaining the Answer and Demurrer to Motion to Quash filed by the State made said ruling upon the authority of said State vs. Wilson.

18.

Petitioner further points out that Your Honors in affirming the said ruling of the trial court did so upon the authority and precedent of said State vs. Wilson and the interpretation of said statute in said case.

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19.

The petitioner submits that the Court is in error in interpreting R. S. 15:202 as it did in the Wilson case and in the instant case.

20.

That such an interpretation completely and essentially changes said statute and makes it say something it does not say, and that such an interpretation is an unconstitutional exercise of judicial

tended by the Legislature in its use of the above italicised language, that objections to the selection or composition of juries or venires must be urged "before the expiration of the third judicial day" of the jury term. After an exhaustive review of the history of the prior laws on the subject and a painstaking and comprehensive discussion of the language of the Article, it was concluded that, in order that the provision might be applied with fairness and consistency in all cases, the Legislature intended that anyone desiring to challenge the array or selection of any jury was required to urge his objection before the expiration of the third judicial day *following* the term for which the jury had been drawn, or before entering upon the trial of the case if it be begun sooner.

545 Counsel for appellant assail the Wilson decision, proclaiming that the interpretation there given to R.S. 15:202 is unsound when applied to the facts of this case and that it should be overruled. Alternatively, they suggest that, at all events, the decision does not control the special situation presented here and should be differentiated.

We do not find it necessary to review in detail the basis of the ruling in the Wilson case. Suffice it to say that we think that it represents a correct analysis of the intention the Legislature was attempting to express in the writing of the statute and that, under this interpretation of the language, a *reasonable time is provided to all persons charged with crime within which to file whatever objections they may have to the method of selecting any jury or venire.* Moreover, it is evident that the Legislature has since approved of the construction given to Article 202 of the Code of Criminal Procedure by this court in the Wilson case, which was decided in 1943, as it incorporated the Article without change in the Revised Statutes of 1950.

However, counsel insist that the statute as interpreted in the Wilson case is unfair, if applied to the facts of this matter, as they claim that they were not appointed to defend appellant until more than three days after the expiration of the jury term had elapsed — thus, depriving them of asserting on appellant's behalf his right to an equal protection of the law.

There might have been merit in this postulation if the predicate upon which it is based was supported by the record. But the minutes of the Court show that appellant's chief counsel, Mr. Gerard H. Schreiber, an attorney of experience in criminal cases, was appointed by the judge to represent him on March 2nd 1953 (not on March 5th, as counsel contends and this is verified by the per curiam of the judge. It is true that the other counsel, also an experienced criminal lawyer, was appointed on March 6th 1953, but this is of no importance as appellant was already represented by an attorney. See State vs. Wilson, supra. Hence, since appellant had the benefit

power because it is an act of legislation and not an act of judicial interpretation.

21.

That any statute which deprives a defendant, arbitrarily and unreasonably, of an opportunity to prove facts which would amount to a prima facie case of systematic exclusion of colored persons because of their color from the Grand Jury which indicted him, is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States, and of the Constitution of the State of Louisiana, Article 1, Section 9, which guarantees unto all defendants the right to a public trial by an impartial jury and, in capital cases, the guarantee of not to be held for answer to said crime unless on a presentment or indictment by a grand jury which, it necessarily follows, must also be an impartial one.

22.

That the interpretation placed upon R.S. 15:202 deprived petitioner of his right to file his motion to quash the indictment as guaranteed or provided in R.S. 15:284, and of his right to have his said motion to quash filed, tried and disposed of before trial on the merits, as provided in R.S. 15:287.

Petitioner further shows that a rehearing should be granted and, finally, the judgment of the District Court should be reversed and set aside.

The premises considered, petitioner prays that, after due consideration, a rehearing be granted in this case; and that, finally, the judgment of the District Court be avoided and reversed, and judgment rendered in favor of petitioner herein granting unto petitioner a new trial; and for all general and equitable relief, etc.

Attorneys for Petitioner

REHEARING REFUSED—July 2, 1954

of counsel on March 2nd 1953, the same day that the Grand Jury term ended, his contention, that it is unreasonable to apply the prescription of the law in this case, falls of its own weight, as his counsel had ample time, three judicial days from the date of
546 his appointment, to have filed the motion to quash the indictment.

Our ruling that the judge was correct in sustaining the State's demurrer to the motion to quash the indictment effectually disposes of Bill of Exceptions No. 2, which was taken to the overruling of appellant's motion to perpetuate testimony in support of the motion to quash.

Appellant, having been indicted for aggravated rape under the short form provided by Article 235 of the Code of Criminal Procedure (R. S. 15:235), availed himself of the provisions thereof by requesting the State to furnish a bill of particulars. In a supplemental motion, he asked that he be advised (a) of the particular type of aggravated rape on which the prosecution was based; (b) if any force was used and the type of force and (c) if any threats were made and the type of threats.

The State answered that the prosecution was founded on paragraphs (1) and (2) of R. S. 14:42, in that the victim had resisted the act to the utmost but that her resistance was overcome by force and, particularly, in that she was prevented from resisting the act by threats of great bodily harm accompanied by the apparent power of execution. Pleading that its answer should be deemed good and sufficient, the State set forth that it should not be ordered to give the additional information requested by appellant, respecting the type of threats or force used by him, as this pertained to the details of the evidence which it was not required by law to furnish in advance of the trial.

When the court ruled that the information given by the State was adequate, counsel for appellant reserved Bill of Exceptions No. 3 and, we understand from their brief, that they now profess that the failure of the judge to coerce the State to give all requested particulars deprived appellant of the right guaranteed him by Section 10 of Article 1 of our Constitution, that the accused in criminal prosecutions shall be informed of the nature and cause of the accusation against him.

There is not merit in the bill. It has been held many times by this court that the short forms prescribed by R. S. 15:235
547 are not violative of Section 10 of Article 1 of the Constitution in instances where they inform the accused of the nature and cause of the accusation. State vs. Wright, 215 La. 529, 41 So. (2d) 76 and cases there cited and State vs. Roshto, 222 La. 187, 62 So. (2d) 268. This is certainly true of the short form indictment for aggravated rape. In this case, the bill of particulars furnished

by the State gave appellant all of the information necessary for his counsel to properly defend him and the judge correctly ruled that the particulars withheld pertained solely to the nature of the evidence to which appellant was not entitled: State vs. Pye, 214 La. 606, 38 So. (2d) 359.

Bill of Exceptions No. 4 was reserved to the sustaining of the State's challenge for cause of a prospective juror, a Mr. Ford, based on his statement that, while he did not object to capital punishment, he did not feel that he wanted " * * * to be one of those responsible for rendering a verdict in this case."

There is no substance in the bill for, even if it be assumed that the ruling was incorrect (which it was not), appellant is not in a position to complain inasmuch as the minutes show that the State used only eight of the twelve peremptory challenges allowed to it by law. Under the provisions of Article 353 of the Code of Criminal Procedure (now R. S. 15:353), a defendant suffers no prejudice from the sustaining of a challenge for cause "unless the effect of such ruling is the exercise by the prosecution of more peremptory challenges than it is entitled to by law. * * *." See also State vs. Thomas, 41 La. Ann. 1088, 6 So. 803 and State vs. Jackson, 42 La. Ann. 1170, 8 So. 297.

Bill of Exceptions No. 5 was taken to the allowance by the judge of peremptory challenges made by the State to two prospective jurors after they had been examined on their voir dire both by the prosecution and counsel for appellant and accepted by the latter.

That the practice complained of is permissible under the law is recognized by a long list of authorities. See State vs. Ussery, 178 La. 593, 152 So. 302; State vs. Thornhill, 188 La. 762, 173 So. 343; State vs. Ezell, 189 La. 151, 179 So. 64; State vs. Boone, 194 La. 977, 195 So. 511 and State vs. Henry, 97 La. 999, 3 So. (2d) 104. Moreover, R. S. 15:358 vests in the judge absolute discretion, not
548 subject to review, " * * * to allow either side to peremptorily challenge jurors up to the time that the jury is impanelled."

Counsel for appellant took Bill of Exceptions No. 6 to the action of the trial judge in ordering that prospective jurors be called in groups of six instead of in groups of three.

We fail to see how appellant was injured by this action. The manner of selecting a jury rests within the sound discretion of the trial judge and, as long as the accused is afforded the opportunity to examine each prospective juror with respect to his qualifications and to exercise his right of challenge, he has no reason to complain. State vs. Roberson, 157 La. 974, 103 So. 283.

Bill No. 7 was taken to the overruling of appellant's objection to a statement made by the district attorney to a group of prospective jurors in examining them on their voire dire. The district attorney, in rebuttal of certain statements made by defense counsel

concerning the effect of evidence of good character, remarked to the jurors that evidence of good character would be of no avail to appellant if the State proved to their satisfaction his guilt beyond a reasonable doubt.

There is no substance in the bill. The challenged remark is a correct statement of the law which is that; whereas evidence of good character of an accused is always admissible in his behalf, it must be considered in connection with and as a part of the whole testimony " * * * but it cannot destroy conclusive evidence of guilt". R.S. 15:480. See also State vs. Simon, 131 La. 520, 59 So. 975. The judge informs us in his per curiam that he instructed the jury on the question of character evidence in accordance with the foregoing rule of law.

While one of defense counsel was propounding questions to a group of prospective jurors, he stated that drunkenness was a defense to the crime for which appellant was on trial. The district attorney objected to the remark, and when the judge sustained the objection, counsel reserved Bill No. 8. It is claimed that this was an erroneous ruling as subsection 2 of R.S. 14:15 provides that intoxication is a defense to crimes requiring specific criminal intent and that aggravated rape is such a crime.

549 The bill is not well founded. Specific criminal intent, which is defined by R.S. 14:10, is not a necessary element of the offense of aggravated rape. The case of State vs. Ferrand, 210 La. 394, 27 So. (2d) 174, relied on by defense counsel, is not in point. There, the court held that specific intent was an element of the crime of attempted aggravated rape. This ruling was based on the sound premise that all attempts, as defined by R.S. 14:27, require specific intent.

Bill No. 9 was reserved when the judge sustained an objection of the district attorney to defense counsel repeatedly referring to appellant in the presence of the prospective jurors as "this boy".

The judge, in his per curiam, states that he maintained the objection because he did not consider the accused, who was nineteen years of age, to be a boy and he further observes that it was impossible for him to believe that appellant was prejudiced by the ruling as the petit jury was instructed to concern themselves only with the evidence heard in the courtroom and the law, as given to them by the court, in determining the guilt or innocence of appellant.

We do not regard the matter upon which this bill is predicated to be of any importance. It is manifest, even if we assumed that the ruling of the judge was incorrect in depriving counsel of referring to appellant as a boy, the error would not be of such a prejudicial nature as to warrant a reversal of the conviction. R.S. 15:557.

Bill of Exceptions No. 10 was reserved to the overruling of defense counsel's objection to the following statement, which was addressed

by the district attorney to a group of prospective jurors on their voir dire:

> "If the prosecuting witness in this case is a girl of about fifteen or sixteen years of age, the defendant at the bar is eighteen or nineteen years of age, the mere fact that this defendant is eighteen or nineteen years of age, would that influence you in arriving at a verdict in this case?"

Counsel take the position that the ages of the victim and appellant were most important and that the question directed by the district attorney was an attempt on his part to commit the jurors not to consider this very relevant factor.

We do not believe that the conclusion drawn by counsel anent the district attorney's motives is justified. In our opinion the question was perfectly proper; it was propounded to ascertain the state of mind of the prospective jurors so as to determine whether
550 they stood indifferent between the prosecution and the appellant, irrespective of the ages of the parties involved.

Bill of Exceptions No. 11 was taken to the action of the trial judge in sustaining the State's objection to the issuance of a writ of subpoena duces tecum applied for by appellant for the production of the records, from February 11th through February 17th 1953, of six District Police Stations, those of the Juvenile Division and the Show-Up Room of the Police Department, for the stated purpose of proving that appellant was incarcerated in several district police stations after his arrest and that numerous other men were being held at that time on suspicion for the same crime.

The ruling complained of is correct. To begin with, the records sought to be subpoenaed were not material, as they were wholly without bearing on the question of the guilt or innocence of appellant. Moreover, if we assume that they were public records, they were clearly excepted from the provisions of the Public Records Act, (R.S. 44: 1, 2, 3) and appellant was not entitled to their inspection until they were used in open court. See State vs. Dallao, 187 La. 392, 175 So. 4 and State vs. Mattio, 212 La. 284, 31 So. (2d) 801

In his opening statement to the jury, the district attorney related in sequence the events that took place on the night of the crime, that is, appellant's robbery, his forcing his victim to commit a crime against nature, and the three acts of rape which followed. Defense counsel objected to the statement, insofar as it referred to the crimes other than the acts of rape for which appellant was charged, on the ground that those crimes were not properly within the scope of an opening statement and should not be included therein. When the judge overruled the objections, counsel reserved Bills Nos. 12, 13 and 14.

There is no merit whatever in these bills. It would have been impossible for the district attorney to have made a clear statement of the offense without including therein a recital of all acts done and the other crimes committed by appellant, as they were part and parcel of one continuous transaction. Obviously, they constituted part of the res gestae and were admissible as original evidence. State vs. Sears, 217 La. 47, 46 So. (2d) 34 and cases there cited. This being so, it was not improper for the district attorney to mention them in his opening statement.

551 While the victim was on the stand, she was asked the question "Was that the little girl with you on the night of the alleged rape and ravishment?" to which she answered "Yes". Defense counsel thereupon objected to the use of the word "ravishment". The judge sustained the objection and instructed the jury to disregard that word. Counsel then moved for a mistrial and, when it was denied, bill No. 15 was reserved.

The complaint is shallow. It appears to us that the judge was overly cautious in sustaining the objection of counsel as the word "ravishment" is nothing more than a synonym of rape but, in any event, we are at a loss to understand the theory upon which counsel conceive that appellant was entitled to a mistrial.

During the examination of the victim on the stand, she was asked "While you were on your stomach, please state to the court and jury just what the defendant did?" Defense counsel objected and, when overruled, reserved Bill No. 16. Thereupon, the victim answered "He tried to enter me from the back". Counsel then moved for a mistrial on the ground that the district attorney had not mentioned this fact in his opening statement. When the judge denied the motion Bill No. 17 was taken.

These bills are clearly without merit. Counsel do not advance any reason for the objection to the question concerning appellant's action after he had forced the victim to lie on her stomach and we can think of none. And the basis for the motion for the mistrial, because of the answer given by the victim, is purely captious aside from being in utter contradiction to the position taken by counsel with respect to Bills Nos. 12, 13 and 14.

Bill No. 18 is in the same category. The district attorney asked the victim whether appellant said he "liked white skin". When she answered "Yes", counsel moved for a mistrial which motion was overruled. We cannot imagine why counsel think that it was improper for the victim to relate a statement given by appellant, which unquestionably formed part of the res gestae.

This observation likewise applies to Bill No. 19 which was taken to the question propounded by the judge to the victim as to what clothes she had on at the time she left the scene of the crime.

552 When the victim was on the stand, she was asked whether she had ever had sexual intercourse before the night on

which the crime was perpetrated. Defense counsel objected and the judge first overruled the objection but, before the question could be answered, he changed his mind and sustained it. Counsel then moved for a mistrial, which was refused. Bill No. 20 was then reserved.

It is now argued that the judge should have instructed the jury to disregard the question and his failure to do so constitutes reversible error.

There is no substance in the argument. We know of no law requiring the judge, on his own volition, to instruct the jury to disregard a question to which an objection has been sustained. Conversely, the burden is on defense counsel to request such an instruction if he feels that the improper question might be damaging to the accused.

Bill No. 21 was taken to the overruling of an objection to the admission in evidence of the purse and its contents carried by the victim on the night of the crime.

It is to be conceded that these articles, though probably admissible a part of the res gestae, had little evidentiary value. This being so, it is difficult to perceive that appellant was harmed by their reception. Counsel say, however, that appellant might have been prejudiced because the purse contained numerous pictures of young girls, dressed in the uniform of the parochial school which the victim attended. We regard this as a matter of no consequence.

During the course of the trial the district attorney tendered for admission two pictures of appellant, in company with other negro males, which had been taken by Mr. John T. Dahmun, a member of the Bertillion Office of the New Orleans Police Department, stating that they were offered in connection with the testimony of Dahmun and the victim. Counsel for appellant objected on the ground that the pictures had not been properly identified by the victim and that they had not been taken in her presence. When the objection was overruled, Bill No. 22 was reserved.

The bill is without merit. The trial judge states in his per curiam that the pictures were satisfactorily identified by Mr. Dahmun, who took them, prior to their introduction. This is all that was necessary.

553 Bill No. 23 is also without merit. It was taken to a question directed to the Coroner, while he was on the witness stand, as to whether the vaginal examination of the victim revealed "fresh" bleeding. The basis of the objection was that the district attorney, in his opening statement to the jury, quoted the coroner as reporting that the vaginal examination revealed "frank" bleeding.

The trial judge correctly stated in his per curiam that he did not consider the difference between "frank" and "fresh" bleeding to be

of such a nature as to exclude the evidence from the record. As a matter of fact, the word "frank," which means open or free, is practically the same as "fresh" when applied to bleeding. See Webster's New International Dictionary (2nd Ed.).

In corroboration of the testimony of the victim, the State offered in evidence several "ecochrome" photographs of her which had been taken on the morning after the commission of the offense. Counsel objected and, when overruled, reserved Bill No. 24. Thereafter, the State requested that the pictures be exhibited in a dark room connected with the Coroner's office. Counsel objected, reserving Bill No. 25 to the overruling of the objection and, prior to the exhibiting of the pictures, moved for a mistrial on the ground that the exhibition constituted an invasion of appellant's constitutional rights. The motion was overruled and Bill No. 26 was taken.

There is no merit in any of these bills. The judge states in his per curiam that the photographs were properly identified before their introduction. They were clearly admissible in support of the State's case; they were taken on the morning after the crime and revealed numerous bruises on the body of the victim. Their exhibition to the jury in a dark room of the Coroner's office was within the sound discretion of the judge. We fail to see that the judge abused his power or how any constitutional right of appellant was invaded.

After the jury had returned to the courtroom following the showing of the color pictures in the Coroner's office, defense counsel filed another motion for a mistrial on the ground that the Deputy Sheriff, who had the defendant in charge during the exhibition, had
554 held him in a degrading manner. The judge overruled the motion, stating that he found nothing degrading about the way the Deputy Sheriff handled appellant, whereupon counsel reserved Bill No. 28 and, in argument here, takes issue with the judge on this point.

It is enough to say, in answer to this bill, that we are bound by the per curiam of the judge, in the absence of clear evidence to the contrary, and cannot accept counsel's version of the occurrence.

When one Patrick Natal was testifying for the State, the district attorney offered him a written statement, which he had previously given, for the purpose of refreshing his memory. Defense counsel immediately objected on the ground that this was in the nature of a leading question. When overruled, Bill No. 28 was reserved.

This bill is unsubstantial. The district attorney plainly had the right to show the witness his prior written statement for the purpose of having him refresh his memory.

While Mr. Natal was on the stand, he was asked by the district attorney whether the victim had told him by whom she had been raped. Defense counsel objected and the court then stated that the question had already been answered so there was nothing to rule on.

Counsel thereupon took issue with the judge, stating that he did not think that the question had been answered. The court consulted the stenographer, but he said that he did not have an answer to the question in the record. The judge then asked the witness whether he had answered the question. The witness replied that he believed he said "back there" and the judge told him "you said something else, what was it?" to which the witness replied "No, sir." At this point, the court addressed the members of the jury, asking them whether there had been an answer, to which several of the jurors replied that the witness had said "It might have been a negro." Whereupon defense counsel moved for a mistrial and, upon being overruled, reserved Bill No. 29.

Counsel argue that the action of the judge constituted a comment on the evidence but we do not so view it. The judge, having heard the question answered, was merely endeavoring to ascertain whether it had also been heard by the other persons participating in the trial; inasmuch as defense counsel had denied the basis upon which the ruling on the objection had been predicated. True enough, the answer had not been heard by the stenographer and the witness himself was apparently reluctant to repeat what he had stated, but the fact remained that the members of the jury heard it and repeated it to the judge. Obviously, this was not a comment by the judge on the evidence—the most that can be said is that it was an expression by him of an opinion that a certain question had been answered. At all events, we fail to perceive that any substantial right of appellant was violated or that he suffered any harm as a consequence of the episode.

Bill No. 30 was taken to the overruling of another motion for a mistrial and is based on the charge that the district attorney was guilty of unfair tactics in that he deliberately attempted to lead a police officer, testifying for the state, so as to have him identify certain underwear as that found by him in the home of appellant.

We find no merit in the bill for the simple reason, apart from any other, that the police officer, Captain William A. Walker, was unable to identify the underwear as that taken by him from appellant's home. Consequently, it is difficult to conceive how defendant was prejudiced.

Bill No. 31 was reserved to the admission in evidence of an envelope bearing appellant's name and address which was in his possession at the time he was arrested. The basis for the objection was that it was irrelevant and immaterial. Assuming that this is true, its admission certainly cannot be viewed as a cause for reversal. Article 557, Code of Criminal Procedure (R.S. 15:557).

Bill No. 32 was taken to the overruling of counsel's objection to the admission in evidence of certain rings and other jewelry which had been taken from the young girls by appellant in the robbery.

which preceded the rape. The basis of the objection was that the proper foundation for the admission of the articles was not laid and that they were not adequately identified. The judge, in his per curiam, takes issue with this contention and shows that the articles were satisfactorily identified, detailing the persons making the identification and the substance of their testimony. Hence, there is no merit in the bill.

Bills Nos. 33, 34, 35 and 36 all relate to the alleged error of the court in admitting appellant's confession in evidence. Our law
556 provides that, before any confession can be received, the State is required to affirmatively prove that it was freely and voluntarily given and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises. Articles 451 and 452, Code of Criminal Procedure (R.S. 15:451, 452) and Section 11 of Article 1 of the Constitution of 1921. And, it is established by the jurisprudence that, before what purports to be a confession can be introduced in evidence, it must be shown by proof which convinces beyond a reasonable doubt that it was voluntary. State vs. Green, 221 La. 713, 60 So. (2d) 208 and authorities there cited.

Appellant was arrested on February 11th 1953 and he made a written confession on February 13th. During the two days he was in custody prior to making the statement, he was in contact with 15 different police officers. All of these officers were placed on the witness stand by the State and each testified unequivocally that no threats or promises were made to appellant to induce him to confess and that the statement he gave was free and voluntary. These witnesses were vigorously cross-examined by defense counsel and they stated, in detail, the facts and circumstances surrounding the giving of the statement. A reading of their testimony fully supports the conclusion of the voluntariness of the confession which was only given after appellant was positively identified by the victim of the rape and her companion of the ill fated night.

Appellant maintains in his testimony that he was under duress when he gave the statement; that he had been jostled around by the officers, being generally subjected to ill treatment and that he was burned on the hand by one of the officers, whom he was unable to identify. Insofar as this alleged burn is concerned, the State showed that he at no time made complaint to the Coroner or anyone else.

After considering the entire evidence, we agree with the trial judge that the State has sustained the burden placed upon it of establishing affirmatively and beyond a reasonable doubt that the confession was free and voluntary.

Bills Nos. 37 and 39 refer to the same matter and may be considered together. They were taken to the refusal of the trial judge of

special charges Nos. 6 and 8 tendered by counsel for appel-
557 lant. By these special charges, counsel sought to have the court instruct the jury that specific intent constituted one of the elements of the crime of aggravated rape and, if for any reason it was not proved the jury would be required to acquit appellant.

We have heretofore pointed out, in discussing Bill of Exceptions No. 8, that specific intent is not a necessary ingredient of the crime of rape, which is defined to be the act of sexual intercourse with a female person, not the wife of the offender, "committed without her lawful consent". R.S. 14:41. The judge was, therefore, correct in refusing the special charges.

Bill No. 38 was taken to the refusal of a special charge submitted by counsel for appellant reading as follows: "I charge you that either the State or the Defense has a right to attack any statement, confession or admission introduced in evidence by introducing other evidence to contradict all or a part of said statement, admission or confession. However, I further charge you that every part of every statement, admission or confession that is not contradicted binds him who introduces it."

The judge states in his per curiam that he refused this charge as being inapplicable to the case forasmuch as no such condition existed nor was there any evidence introduced to which the charge could possibly apply.

In submitting this Bill of Exceptions, counsel do not attempt to show its pertinence to the case. At best, the charge, as framed, is somewhat incongruous. Under these circumstances, the judge's ruling was correct. See Article 390, Code of Criminal Procedure (R.S. 15:390).

Bills of Exceptions Nos. 40, 41 and 42 were taken to the overruling of two motions for a new trial and a motion in arrest of judgment. The motions for a new trial aver, among other things, that the verdict is contrary to the law and the evidence, which presents nothing for review, and further reiterate the alleged errors which we have already discussed and on which we have heretofore ruled.

The motion in arrest of judgment, being likewise predicated on errors of which we have disposed and which are said appear on the face of the record, presents nothing new for consideration.

The conviction and sentence are affirmed.

558 IN SUPREME COURT OF THE STATE OF LOUISIANA

[Title omitted]

APPLICATION FOR REHEARING

The petition of John Michel, defendant and appellant, respectfully represents:

That the opinion and decree rendered in this cause on the 31st day of May, 1954, is erroneous and contrary to the law and evidence, and prejudical to the interest of petitioner, and that a rehearing should be granted in this matter, for the following reasons, to wit:

1.

Petitioner, John Michel, a colored man, was indicted in the Parish of Orleans, State of Louisiana, for the crime of Aggravated Rape upon a certain white female; and on said indictment he was convicted and sentenced to death.

2.

In the Parish of Orleans where some thirty-two (32%) percent or some 227,000 of the total population are colored persons, where there are two colored universities, one colored hospital, corporate and unincorporated businesses owned and operated exclusively by colored persons, colored physicians, colored nurses, colored pharmacists, colored lawyers; and some nine hundred colored school teachers in the school system of New Orleans, no colored person, within the memory of any living person, with the single exception to be noted immediately hereinafter, has ever served on the Grand Jury of the Parish of Orleans, including the Grand Jury that indicted your petitioner.

3.

The single exception in which one colored person served on a Grand Jury in Orleans Parish was in the year 1936 when one R. J. Walker, a colored person who appeared to be a white person was selected for Grand Jury service by the then judge of Section "E" of the Criminal District Court, Parish of Orleans, because the judge mistook him, the said Walker, for a white man and selected him as a Grand Juror because he, the judge, thought that the said Walker was a white man.

4.

That the above allegations are allegations of public facts and publicly known facts in the Parish of Orleans, and facts which have been judicially established in State vs. Alfred Dowells, No. 139,324 and State vs. Green, No. ——— of the docket of the Criminal District Court for the Parish of Orleans; that Your Honors are cognizant of the fact that the Supreme Court

of the United States has repeatedly and consistently re-affirmed that the facts set forth in the above allegations constitute a prima facie case of intentional and systematic discrimination against colored citizens because of their color in the selection of grand jurors by those officers whose duty it is to select grand jurors, and that grand juries so selected are selected in violation of the Fourteenth Amendment of the Constitution of the United States and of the Civil Rights Act enacted by Congress under the authority of said Fourteenth Amendment, and that indictments returned by such grand juries against colored persons cannot stand.

5.

Louisiana Revised Statutes of 1950, Title 14, Article 42, creates and defines the crime of Aggravated Rape and provides the death penalty therefor. The Constitution of Louisiana, Article 1, Section 9, provides: " . . . no person shall be held to answer for capital crime unless on a presentment or indictment by a grand jury . . . "

6.

The inevitable all-white and then current Grand Jury of the Parish of Orleans indicted petitioner on February 19, 1953 for the said crime of aggravated rape on a certain white female. The date of the alleged crime in the indictment is February 10, 1953.

7.

On March 9, 1953, before arraignment on said indictment in the trial court, petitioner filed a motion to quash said indictment because the grand jury which returned said indictment was selected in violation of petitioner's right to the equal protection of the laws as guaranteed by the Constitution of the United States. That considering the colored population of the Parish of Orleans and the fact that no colored person ever served on a Grand Jury in the Parish of Orleans, with the exception already noted, that there was an unlawful, systematic and unconstitutional exclusion of colored persons from Grand Juries. That the motion to quash filed by petitioner speaks for itself for the substance thereof and for the purpose of establishing the fact that the Federal constitutional issue was timely and unequivocally raised in the trial court at the very inception of this prosecution.

560

8.

On March 23, 1953, the State of Louisiana through the District Attorney for the Parish of Orleans filed an Answer and Demurrer to the Motion to Quash, that is, an answer to the Motion to Quash filed by your petitioner; this Answer and Demurrer to

the Motion to Quash was sustained by the trial court and petitioner by said ruling was thereupon and thereby cut off and deprived of the opportunity to make legal proof of the details which are alleged in the first four articles of this petition, and which constitute prima facie proof of the intentional and systematic exclusion of colored persons because of their color from the Grand Jury which indicted petitioner, in violation of the Fourteenth Amendment to the Constitution of the United States. A bill of exception was timely and properly reserved to this ruling of the trial court.

9.

Before the trial court made its ruling, which petitioner claims was adverse and illegal, petitioner filed in the record an Answer to Demurrer, and calls Your Honor's attention to the contents of his Answer to Demurrer which sets out, among other things, the details of population, etc., which petitioner was attempting to make legal proof of to show that in fact and prima facie the Grand Jury which indicted petitioner was selected in violation of the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act enacted by Congress under the authority of said Amendment.

10.

Petitioners Answer to the Demurrer is further important because it is added proof of the fact that petitioner timely and properly in the trial court and at the very inception of this prosecution raised the Federal question and issue involved.

11.

Your Honors sustained the ruling of the trial court, and this brings petitioner to the crux of this petition. Revised Statutes of Louisiana, 1950, Title 15, Article 202, reads as follows:

> "All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise all such objections shall be considered as waived and shall not afterwards be urged or heard.

561 12.

Petitioner respectfully requests Your Honors to note the following words and language of said statute: "All objections . . . must be filed . . . before the expiration of the third

judicial day OF THE TERM FOR WHICH SAID JURY SHALL HAVE BEEN DRAWN . . ." Respectfully, the words and language of said statute are common, simple, every day English words with a meaning that is easily, readily and unmistakably understood by all English speaking peoples throughout the world. "THE THIRD JUDICIAL DAY OF THE TERM FOR WHICH SAID JURY SHALL HAVE BEEN DRAWN" means "THE THIRD JUDICIAL DAY OF THE TERM FOR WHICH SAID JURY SHALL HAVE BEEN DRAWN."

The first judicial day of the term for which the jury is drawn means the first judicial day of their term of service as jurors.

The second judicial day of the term for which the jury is drawn is the second judicial day of their term of service as jurors.

The third judicial day of the term for which said jurors are drawn is the third judicial day of their term of service as jurors.

Petitioner respectfully asserts that the judicial interpretation of this language of this statute which judicial interpretation says that where a grand jury is involved that "THE THIRD JUDICIAL DAY OF THE TERM FOR WHICH THE GRAND JURY IS DRAWN" means "BEFORE THE THIRD JUDICIAL DAY AFTER THE TERM OF SERVICE OF THE GRAND JURY HAS EXPIRED", with all deference and proper respect to Your Honors, is an arbitrary and unreasonable interpretation of the language of this statute; that it is an interpretation that completely and essentially changes said statute and makes said statute say something that the statute does not say; and that such an interpretation is an unconstitutional exercise of judicial power because IT IS AN ACT OF LEGISLATION and not an act of judicial interpretation.

13.

Petitioner respectfully suggests that there is ONE and ONLY ONE REASONABLE INTERPRETATION OF THE LANGUAGE of said statute and that is to declare that the legislature in enacting this statute had in mind and intended this statute to apply only to petit jury venires and petit jury arrays because this statute reasonably and with legal justification and propriety can be applied to petit jury venires, but it is impossible to apply this statute as this statute is written to a grand jury venire or array.

562

14.

Petitioner avers that the Grand Jury in Louisiana serves for six (6) months, from the first Monday (Tuesday) of September to the first Monday of March, and from the first Monday of March to the first Monday (Tuesday) of September; that the crime for which petitioner was indicted allegedly occurred on February 10, 1953, so that the term of the Grand Jury which indicted petitioner was approximately five months expired before the crime was committed.

565 SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 226 Misc.

JOHN MICHEL, PETITIONER

vs.

STATE OF LOUISIANA

On petition for writ of Certiorari to the Supreme Court of the State of Louisiana.

ORDER ALLOWING CERTIORARI—February 7, 1955

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted and the case is transferred to the appellate docket as No. 579.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 32

JOHN MICHEL, *Petitioner*

v.

STATE OF LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR PETITIONER

GEORGE H. FUST,
1002 Pere Marquette Building,
New Orleans, Louisiana.

GERARD H. SCHREIBER,
1707 Pere Marquette Building,
New Orleans, Louisiana.
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 32

JOHN MICHEL, *Petitioner*

v.

STATE OF LOUISIANA, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR PETITIONER

May It Please the Court:

Statement of the Case

John Michel, a young negro male, petitioner herein, was indicted by the Grand Jury for the Parish of Orleans, State of Louisiana, with having, on February 10, 1953, committed the crime of aggravated rape on a young white female. The indictment was returned on February 19, 1953. (T. p. 11)

Aggravated rape, defined by R.S. 14:42 (*Infra* p. *i.*) is a capital crime in the State of Louisiana.

On Monday, February 23, 1953, John Michel was brought before the bar of the Criminal District Court for the Parish of Orleans, State of Louisiana, for arraignment, and not being represented by counsel, his arraignment was continued until Monday, March 2, 1953, or one week later.

On this date, John Michel was brought back before the bar of the Court and, while some question exists as to

exactly what took place, the Record shows that Gerard H. Schreiber, Esquire, was appointed by the court to represent the defendant, and his arraignment continued for another week, or until Monday, March 9, 1953.

Reference to Bill of Exceptions No. 1 (T. p. 30), and the testimony made a part of this bill, will explain what took place in Court on March 2, 1953, and the misunderstanding that arose thereby.

Coincidentally, on this very same day, the term of the Grand Jury expired.

On March 9, 1953, the date to which the arraignment had been continued, the fifth judicial day following the expiration of the term of the Grand Jury, John Michel was again brought before the bar of the court, at which time *before answering to the indictment*, through Mr. Schreiber and George H. Fust, Esquire, he filed a motion to quash the indictment on the following grounds:

> 1. That he is a negro.
> 2. That there were no negroes on the Grand Jury that indicted him, having been unlawfully and unconstitutionally systematically excluded therefrom since time immensurable. (T. p. 16)

On March 23, 1953, the state demurred to petitioner's motion to quash on the grounds that it had been filed more than three judicial days after the expiration of the Grand Jury term thereby, *allegedly* being contrary to the provisions of L.R.S. 15:202. (*Infra* p. *i.*)

On March 30, 1953, through counsel, your petitioner filed an answer to the state's demurrer in which he set out *in particularity* the multitudinous facts pertinent to his motion to quash. (T. p. 18)

On April 8, 1953, the trial court sustained the state's demurrer and overruled the defendant's motion to quash (T.

p. 18), to which ruling the defendant properly and timely reserved a bill of exceptions (T. p. 30), and filed a motion to perpetuate the testimony in support of the motion to quash (T. p. 21) which was also overruled (T. p. 21) and another bill of exception properly and timely reserved. (T. p. 39)

On May 28, 1953, your petitioner was found guilty as charged and remanded to await sentence. (T. p. 14)

On July 6, 1953, your petitioner filed motions for a new trial (T. 22) and in arrest of judgment (T. 23) both of which were overruled by the Court and bills of exceptions properly and timely reserved (T. 41 and T. 44), and on November 2, 1953 filed a supplemental motion for a new trial (T. 24) which was also overruled and a bill of exceptions similarly reserved. (T. 43)

On November 9, 1953, your petitioner was sentenced to death by electrocution (T. p. 15) at which time counsel filed a motion for suspensive appeal, (T. 29)

On May 31, 1954, the Supreme Court of the State of Louisiana rendered an opinion affirming your petitioner's conviction and sentence (T. 45) which was followed by a motion for a rehearing filed by your petitioner (T. 58), which was refused on July 2, 1954.

Your petitioner has applied to this Honorable Court for writs of certiorari which were granted. (T. 64)

Questions Presented For Review

A state statute provided that attacks on a jury venire had to be filed before the expiration of the third judicial day *of* the term for which the venire was drawn. For more than fifty years, a person indicted after this time had until his arraignment or trial to attack the venire. In 1943, the State Supreme Court interpreted this language to mean before the expiration of the third judicial day *following*

the term. A Negro male indicted for a capital crime moved to quash his indictment on the grounds that it had been returned by an all white grand jury from which negroes had been systematically excluded. He was prevented from doing so by the invoking of the Supreme Court's interpretation of 1943.

1. Has he been denied due process of law?
2. Was this "interpretation" of 1943 "judicial legislation" rather than "judicial interpretation"?
3. Is a state statute, the arbitrary and unreasonable interpretation of which deprives a defendant of his right to prove a prima facie case of unlawful discrimination in the qualification of jurors who were disqualified because of race, creed, or previous condition of servitude, constitutional?

Argument

May It Please the Court:

John Michel, petitioner herein, a colored male, was indicted by the Grand Jury for the Parish of Orleans, State of Louisiana, and convicted capitally for the rape of a white woman.

More than 32% or some 250,000 of the population of Orleans Parish is colored.

Including the Grand Jury that indicted petitioner, within the memory of no living man, has a colored person ever been selected as a Grand Juror in Orleans Parish with a single exception in 1936, when a Judge of the Criminal District Court for the Parish of Orleans, selected one R. J. Walker, a colored man who looked like a white man, as a Grand Juror, under the mistaken idea that Walker was a white man. This fact has been proven judicially on several occasions in other cases. Walker is still living and so testified.

Before his arraignment, and before pleading to the merits, as he should have done according to the repeated rulings of this Honorable Court, petitioner properly moved to quash the indictment on the grounds that the Grand Jury that returned said indictment was selected and empaneled in violation of the Fourteenth Amendment and the Civil Rights Act of the United States.

Petitioner then and there stood ready to prove the facts hereinabove stated and also that in Orleans Parish there are many thousands of colored persons qualified for Grand Jury service as borne out by the fact that there are two colored universities in the City of New Orleans, one of which has been in existence since 1869; that approximately 40% of the enrollment of the public, private and parochial schools are colored children; that there are countless numbers of colored lawyers, physicians, business executives, school teachers, and dentists; and that there have been colored persons serving on federal Grand Juries in New Orleans for many years. (T. 18)

The trial court ruled that petitioner could offer no proof whatsoever of such flagrant, persistent, and systematic discrimination against colored citizens because of their race and color in the selection of grand jurors in Orleans Parish, and overruled petitioner's motion to quash. (T. 18) Petitioner timely and properly reserved a bill of exceptions to the ruling, (T. 30) and further moved to perpetuate the testimony in support of his motion to quash which was also denied. (T. p. 21)

On appeal, the Supreme Court of Louisiana sustained this ruling of the trial court. *State* v. *Michel*, 225 La. 1040, 74 So. 2d. 207.

Petitioner then applied to this Honorable Court for writs which were granted.

The trial court's ruling was based upon the decision of

the Supreme Court of Louisiana in *State* v. *Wilson*, 204 La. 24, 14 So. 2d. 873. The ruling of the trial court was that one of the two counsel appointed to represent petitioner herein was appointed on March 2, 1953, the date of the expiration of the term of the Grand Jury that indicted petitioner;

That under the "interpretation" of a Louisiana Statute, L.R.S. 15:202, by the Louisiana Supreme Court in *State* v. *Wilson, supra,* petitioner had three judicial days from the date, March 2, 1953, to file the motion to quash but that the motion to quash was not filed until March 9, 1953, the fifth judicial day, which was after the time limit for such motions had expired.

On appeal, the Louisiana Supreme Court sustained the trial court on the precedent and basis of *State* v. *Wilson, supra.*

It is petitioner's contention that *State* v. *Wilson, supra,* and *State* v. *Michel, supra,* are unreasonable, unwarranted and unconstitutional exercises of judicial authority and the decisions and decree of the Supreme Court of Louisiana should be annulled and reversed by this Honorable Court and petitioner granted the right to make his proof in the trial court under his motion to quash.

This cause is concerned primarily with a statute of the Louisiana Legislature, to-wit:—La. Rev. St. Title 15, Section 202, which we will quote in full:

> TIME FOR URGING OBJECTIONS TO ARRAY: WAIVER.
>
> "All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard, or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon

the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived, and shall not afterwards be urged or heard."

From a reading of said statute, Your Honors will note the following:

(a) "All objections . . . to any juror or jury . . . must be . . . urged before the expiration *of* the third judicial day of the term for which said jury shall have been drawn . . . ".

Respectfully and indubitably "before the expiration of the third judicial day *of* the term for which said jury shall have been drawn", is the third judicial day counting from the beginning of the term.

With all deference to the Louisiana Supreme Court this statute does not say "before the expiration of the third judicial day *following* the term for which the jury had been drawn", as their Honors declared in petitioner's case. *State* v. *Michel, supra*, see p. 1050 of the Louisiana citation. (Italics by the Louisiana Supreme Court).

This declaration of the Honorable Supreme Court of Louisiana in petitioner's case, based on *State* v. *Wilson, supra*, is a material and substantial amendment and revision of the statute that only the State Legislature has power to make. For the judiciary to attempt to make and enforce such a revision of the law upon a litigant is an unconstitutional usurpation of Legislative powers.

"Where the language of a statute is plain and unambiguous there is no occasion for construction, and the statute must be given effect according to its plain and obvious meaning". 82 C.J.S. 322, citing numerous authorities.

From a reading of said statute, your Honors will further note

(b) That this is a TIME STATUTE.

That THE TIME ELEMENT makes it a PHYSICAL IMPOSSIBILITY to apply this statute to a Grand Jury, as the statute is written, except in an extremely limited group of cases, viz; those wherein the indictment is returned within the *first* three days of the term of the Grand Jury.

Remembering, of course, that in Louisiana, a Grand Jury is empaneled for six months, it is evident that the number of indictments that will ordinarily be returned in its first three days of service will be few. Consequently, the one and only reasonable "judicial interpretation" of this statute pertinent to our case is the "interpretation" that since it is a virtual PHYSICAL IMPOSSIBILITY to apply this statute AS WRITTEN to a Grand Jury that the Legislature did not have the Grand Jury in mind when it enacted this statute; that the Legislature was thinking only of a petit jury when it enacted this statute; that this statute therefore has no application to Grand Juries at all but only to petit juries.

Which would mean that there is no statute in Louisiana placing a *time* limit in terms of days upon a motion to challenge the constitutionality of a Grand Jury such as petitioner's motion to quash herein and petitioner's motion to quash was therefore timely filed since it was filed before his arraignment, and before pleading to the merits.

(The expression in the statute "any juror or jury" can readily and reasonably be interpreted to mean any petit jury be it a regular term petit jury or a special term petit jury, rather than to mean "any GRAND jury or juror" as well as "any PETIT jury or juror" as the Louisiana Supreme Court felt in the *Wilson* case, *supra*.)

In order to appreciate how radically and materially the Supreme Court of Louisiana amended and revised this Legislative act, may we indulge in the following analysis:

The law as enacted by the Legislature says:

> "before the expiration of the third judicial day *of* the term for which said (grand) jury shall have been drawn." (Parenthesis added).

In this instance the Grand Jury was empaneled September 2, 1952, and the third judicial day according to the statutory time would be September 5, 1952.

The *Wilson* case, *supra*, changes the dead line time from September 5, 1952, to March 5, 1953, a change of six months in the time.

The legislative statute fixes a limit of THREE JUDICIAL DAYS of the Grand Jury term.

The *Wilson case, supra*, changes the THREE JUDICIAL DAY time limit to ONE HUNDRED JUDICIAL DAYS of the Grand Jury term, or thirty, or sixty, or ninety, or twenty-nine, or ninety-nine days, according to the day of the Grand Jury term that the indictment is returned.

A person indicted by the Grand Jury in question on March 2, 1953, WOULD HAVE THREE JUDICIAL DAYS FOLLOWING the term from March 2, 1953.

A person indicted by this Grand Jury on September 2, 1952, would have ONE HUNDRED AND EIGHTY DAYS or more of the jury term. (Not three as the statute says) to attack the Grand Jury.

Humbly and with all deference petitioner alleges that the Honorable Supreme Court of Louisiana RE-ENACTED (as well as amended and revised) the statute because the State Supreme Court's *State* v. *Wilson, supra*, version of the statute HAS BEEN THE LAW OF LOUISIANA since August 4, 1943, the day that *State* v. *Wilson, supra*, was decided by

that Honorable Court and has been enforced by trial courts in Louisiana and by that Honorable court against all colored indicted persons since, notably, petitioner. *State* v. *Michel*, *supra*. See also, *State* v. *Labat*, 226 La. 201, 75 So. 2d 333, No. of the Docket of this Honorable Court.

A further illustration of the manner in which the Louisiana Supreme Court extended the plain language of Article 202 in their decision in the *Wilson* case, *supra*, is their apparent opinion that, if the defendant is not represented by counsel, the time limitation would not run against him until he was so represented.

Notwithstanding the difference of opinion that arose regarding the time that the attorneys representing your petitioner were so appointed, it must be pointed out that according to the clear and unmistakable language of Article 202, this would have no bearing on the matter, and bears thereon only because of the extension of this article by the Louisiana Supreme Court.

Petitioner respectfully submits that he has pointed out to Your Honors that it is impossible to apply L.R.S. 15:202, As Written and as Enacted by the Legislature, to a Grand Jury, except in a very limited group of cases of which your petitioner is not one, and submits that An Impossible Statute is no statute.

Respectfully, if L.R.S. 15:202 as written and enacted by the Legislature was applicable to the Grand Jury it would not have been necessary for the Louisiana Supreme Court To Make Such a Radical Change in the Time so definitely set out and specified in this time statute; and it would not have been necessary for the Supreme Court of Louisiana to add a condition to the statute, namely, "if the defendant has a lawyer"—

In order to make the statute applicable to a Grand Jury, Your Honors had a situation practically identical before

you in the case of *Carter* v. *Texas*, 177 U.S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839.

In that case a Texas statute, similar to L.R.S. 15:202, provided that an attack on the Grand Jury had to be made before the Grand Jury was impaneled. When a motion to quash the indictment on the grounds that there has been a systematic exclusion of negroes from the Grand Jury was filed, it was overruled because it was not in limine. Your Honors held that since the crime had been committed after the Grand Jury was impaneled, the defendant had had no chance to challenge the array and was entitled to present this objection.

In other words, the statute as to *Carter* was *impossible* of application.

The conviction of Carter was reversed.

Your petitioner urges that L.R.S. 15:202 as enacted by the Legislature is equally impossible in its application to him, and that its application was only made possible by its having been *judicially* amended in a substantial, material and radical manner.

Petitioner respectfully urges that it is not L.R.S. 15:202 which gives a defendant who commits a crime four months after the term of the Grand Jury has commenced an opportunity to attack the Grand Jury that indicted him—

It is the Louisiana Supreme Court's amendment and revision of the Article which gives him that opportunity in Louisiana. And this amendment and revision by the Supreme Court of Louisiana respectfully is an unconstitutional exercise of judicial authority which means that we must return to the Article as written and as enacted.

If so applied, it can be held only to be impossible of application to your petitioner's case, and having been so applied, to have been unconstitutional.

And further, *State* v. *Wilson*, *supra*, was enforced against

petitioner herein to deprive him of his right to prove by public and undeniable proof that the Grand Jury that indicted him was selected in violation of his right and the right of every colored person in Orleans Parish to the equal protection of the laws in the selection of this Grand Jury (and all prior Grand Juries for more than half a century).

With due deference to the Honorable Louisiana Supreme Court, your petitioner submits that they made a great mistake when they decided in the *Wilson* case, *supra*, that L.R.S. 15:202 had the same application to Grand Juries as it did to petit juries, and that the words "the third judicial day of the term" meant "the third judicial day *following* the term".

Prior to the *Wilson* case, on numerous occasions, attacks had been on Grand Jury venires as well as petit jury venires. The provisions of L.R.S. 15:202 had been invoked to many of them.

As said by the Chief Justice in his dissenting opinion:

> "Heretofore this Court has held consistently that the expression 'before the expiration of the third judicial day of the term for which said jury shall have been drawn' means before the end of the third judicial day counting from the beginning of the term—not from the expiration of the term. . ." *State* v. *Wilson*, *supra*, p. 885.

Under this long line of jurisprudence, an attack on a petit jury venire had to be made before the expiration of the third judicial day from the beginning of the term. An attack on the Grand Jury venire had to be made within the first three days if the indictment was returned within the first three days, otherwise it had to be made before arraignment or before trial of the case. L.R.S. 15:284, *et seq.*

Since the *Wilson* case was decided no one has known precisely when their objections had to be filed.

This is particularly borne out by the events and opinions of the Louisiana Supreme Court in the case of *State* v. *Chianelli*, 226 La. 552, 76 So. 2d. 727.

In this case a motion to quash the *petit* jury venire was filed five days before his trial but more than three days following the *beginning* of the petit jury term. Despite the ruling of the court in the *Wilson* case to the effect that L.R.S. 15:202 applied to petit juries as well as Grand Juries, and the three day limitation of this article applied to the end of the term rather than the beginning, the District Attorney for the Parish of Orleans envoked the provisions of that Article and filed a demurrer to the defendant's motion to quash on the grounds that it had not been filed within the first three days from the *beginning* of the petit jury term.

The trial judge sustained the state's demurrer and overruled the defendant's motion to quash.

On appeal to the Louisiana Supreme Court, the court of their decision in the *Wilson* case had this to say:

> "We concede that this court's interpretation of Article 202 in the Wilson case may have been somewhat strained. We concede likewise that it might be considered by some to have been judicial legislation rather than judicial interpretation". . .
>
> "We are conscious of the fact that under the interpretation given to Article 202 by the Wilson case and others following it an accused can indefinitely delay the trial of his case by waiting until the date fixed for trial to object to the petit jury array or venire. However, to avoid these unnecessary delays, Article 202 of the Code

of Criminal Procedure requires legislative, not judicial, action. . ."

Your petitioner requests that this Honorable Court also consider the following:

1. In *State* v. *Wilson, supra*, the *stare decisis* case on the subject matter in Louisiana, the then Chief Justice of the Louisiana Supreme Court vigorously dissented and opposed the decision of the majority of the Court. Your petitioner would like to make the Chief Justice's dissenting opinion part of his brief and presentation to this Honorable Court.

2. Shortly after the *Wilson* case was decided the fallacy of the decision was noted in 18 Tulane Law Review 462, where at p. 481, the author had this to say:

> "The confusion surrounding the meaning of Article 202, the extent of its application and its relation to other articles of the Code can be traced to one primary cause—the ambiguous language of the Code. By attempting to treat grand and petit juries alike, applying the same limit to each, the legislature created a problem even under the early statutes when the grand jury was drawn along with the petit juries on the first day of the term of court. Today when grand jury terms and court terms do not coincide, the language of Article 202 falls far short of making clear the legislative intent with regard to this important limit on a defendant's rights. As long as the articles of the Code are so phrased as to give rise to such conflicting interpretations, a defendant with *bona fide* grounds for objection, unable to determine which article is applicable to his case or just what limit the applicable article imposes, may unwittingly allow the time for urging his objection to lapse by relying on the wrong Code article or giving it a different interpretation from that of the supreme

court. *In its present ambiguous form this Article is one source of confusing technicalities of procedure in criminal cases which can be used as a means of side-tracking the issue of race discrimination in the selecting of juries.* (Emphasis added)

3. In 14 Louisiana Law Review 11, at page 19, Professor Dale Bennett, Professor of Criminal Law at Louisiana State University had this to say:

"The method of challenging the validity of an indictment or information, that is, by demurrer or motion to quash, is clearly spelled out in the Code of Criminal Procedure. However, the time for filing such preliminary pleas is confusingly stated in the various codal provisions. Article 284 states that such objections must be taken "before the arraignment". Article 287 declares that the demurrer and motion to quash "must be filed, tried and disposed of before trial on the merits". Even more latitude is apparently contemplated by the declaration in Article 253 that objections to the indictment must "be made prior to the commencement of the trial or at such time thereafter as the court in its discretion permit". In cases where the indictment is defective by reason of the illegal composition of the grand jury list, added confusion is injected by Article 202. Ignoring the possible complications of Article 202, certain fairly definite conclusions emerge from a careful analysis of the above provisions. The defendant's unqualified right to file a demurrer or motion to quash the indictment is controlled by Article 284 which directs the filing of such motions before pleading to the merits at the arraignment. After the accused has entered a plea to the merits he may, in the discretion of the trial judge, withdraw that plea to

plead otherwise. In such cases Article 287 will generally control and the substituted motion to quash must be tried and disposed of before the trial on the merits. While Article 253 authorizes the judge to permit the filing of a motion to quash after the trial is under way, such discretionary permission will seldom be granted since the resulting mistrials are not favored.

To the veteran criminal lawyer or trial judge, the above pattern is fairly well set. However, the inexperienced lawyer or judge is faced with a rather perplexing situation—as evidenced by the fact that cases involving this matter are presented at almost every term of the Supreme Court. A great deal of confusion could be avoided by a very simple statement as to the latest point at which objections to the indictment may be filed as of right, and the latest point at which they may be permitted within the sound discretion of the trial judge. Possibly a rephrasing and combination of Articles 284 and 287 would effect such clarification. At any rate, Article 202 should be eased out of the picture in this regard."

4. After the *Chianelli* case, *supra*, was decided, this question was again reviewed by the Law Review writers, who, in 15 Louisiana Law Review, 749, p. 754, said:

"However, it is submitted that the court in the *Wilson* case was guilty of judicial legislation".

IN THE ALTERNATIVE, it must be pointed out to this Honorable Court the fact that even though there may be some question as to whether L. R. S. 15:202 was meant to apply to Grand Juries as well as Petit Juries, the Supreme Court of the State of Louisiana has consistently held, even in the case of *State of Louisiana* v. *Chianelli*, *supra*, that the said Article 202 did apply to both Grand Juries and Petit Juries.

To quote the Supreme Court of Louisiana in the *Chianelli* case, it is admitted

> "*We concede that this court's interpretation of Article 202 in the Wilson case may have been somewhat strained. We concede likewise that it might be considered by some to have been judicial legislation rather than judicial interpretation.*" (Emphasis added).

We agree that the Supreme Court of the State of Louisiana's opinion in that, in construing or interpreting Article 202 in the *Wilson* case, its interpretation was "*somewhat strained*" when it interpreted the words

> ". . . must be filed . . . before the expiration of the third judicial day of the term for which said jury shall have been drawn . . ."

to mean

> ". . . must be filed . . . before the expiration of the third judicial day following the expiration of the term for which said jury shall have been drawn . . ."

We must state as a simple proposition that Article 202 may be applied to Grand Juries as well as Petit Juries. When an impossible situation occurs, such as a crime occurring after the third judicial day of the term of the Grand Jury and a defendant wishes to file a motion to quash on the ground that the Grand Jury which indicted him was impanelled in violation of the equal protection clause of the 14th Amendment to the Constitution of the United States, and the Civil Rights act enacted in pursuance thereof, he may do so under the authority granted by L. R. S. 15:284, L. R. S. 15:286 and L. R. S. 15:287, which read as follows:

> "L. R. S. 15:284 TIME AND METHOD OF TAKING OBJECTIONS TO INDICTMENT: AMENDMENT OF INDICTMENT.

Every objection to any indictment shall be taken by demurrer or by motion to quash such indictment, before the arraignment; and every court before which any such objection shall be taken for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, and thereupon the trial shall proceed as if no defect had appeared."

"L. R. S. 15:286. DEFECTS IN INDICTMENTS SET UP IN MOTION TO QUASH. Any defect apparent upon the face of the indictment, *or any defect fatal to the validity of the proceedings* may be set up in a motion to quash the indictment, whether such fatal defect be one apparent upon the face of the record, *or be such as can be established only by the production of evidence.*" (Emphasis added)

"L. R. S. 15:287. DEMURRER AND MOTION TO QUASH; FORM AND SPECIFICATIONS; TIME FOR DISPOSITION. Both the demurrer and the motion to quash must be in writing, must specify the grounds upon which based *and must be filed, tried and disposed of before trial on the merits.*" (Emphasis added)

These three articles, L. R. S. 15:284, L. R. S. 15:286, and L. R. S. 15:287, all apply to Grand Juries and not Petit Juries. L. R. S. 15:284 states that "Every objection to any indictment . . ." must be brought within a certain time, etc. Grand Juries only can return indictments; therefore this article does not apply to petit juries. Articles 286 (L. R. S. 15:286) and 287 (L. R. S. 15:287) also refer to defects in the indictment or any defects fatal to the validity of the proceedings which may be set up in a motion to quash the indictment and provides that all motions to quash the indictment must be filed, tried, and disposed of before trial on the merits. Therefore, articles 286 and 287 also apply to Grand Juries and not Petit Juries.

It is submitted that these articles (284, 286 and 287) must be used whenever special circumstances render the use of article 202 impossible because of time limitation or passage.

Article 202 would apply to Grand Juries only during the first three day of the terms of said Juries. After the first three days of the term of the Grand Jury, defendant would resort to the provisions of Articles 284, 286 and 287 in attacking an indictment returned by said Grand Jury. We submit that, in the instant case, defendant could have filed his motion to quash before arraignment under Article 284, which was done by defendant; and could have had his motion to quash tried and disposed of, after establishing the facts in support of his motion to quash by production of evidence (which was also denied defendant) before trial on the merits, in compliance with Articles 286 and 287, all of which was denied defendant herein.

The then Chief Justice of the Supreme Court of Louisiana, the Honorable Charles J. O'Neill, in his dissenting opinion in the case of *State* v. *Wilson*, *supra*, in support of his opinion that the language of Aricle 202 means the first three judicial days of the term of the jury, quoted the case of *State* v. *Smothers*, 168 La. 1099, 123 So. 781, which stated, in part:

> "Bill No. 2 was reserved to the overruling of a motion to quash the petit jury venire. This motion is based upon the same grounds alleged in the motion to quash the indictment. The trial judge's reason for overruling this motion is because it was not filed timely, as provided by Article 202 of the Code of Criminal Procedure. For this and the reasons we have given in our consideration of bill No. 1, the ruling, complained of in this bill, is correct."

> "In this case, the indictment was returned into court before the criminal term at which the trial was

had begun (began). We think Article 202, Code Cr. Proc., applies to such a case: *Whether or not it can be held to apply to indictments returned during "the progress of a criminal term is a question which we are not now called upon to decide. It seems, however, that Article 287, Code Cr. Proc., might be invoked in a case of that kind."* (Emphasis added)

It is submitted that the Supreme Court of the State of Louisiana, in construing and interpreting L. R. S. 15:202 in the *Wilson* case and in the *Michel* case, *supra*, herein being considered by your Honors, and in overruling defendant's motion to quash, based on said *Wilson* case, deprived defendant of his rights to equal protection of the laws and the right to have a Grand Jury impanelled where citizens possessing all other qualifications were disqualified for service as grand Jurors on account of race, color, or previous condition of servitude. These rights were denied to petitioner herein in violation of the Fourteenth Amendment of the Constitution of the United States and the Civil Rights Act, being 18 Stat. 336, U. S. C. Paragraph 44, and the judgment of the Supreme Court of Louisiana, confirming the judgment of the Criminal District Court for the Parish of Orleans, should be annulled and set aside and a new trial ordered.

Summary and Conclusion

In view of all of the above, it is submitted that error was committed by the Criminal District Court for the Parish of Orleans (the trial court) in overruling defendant's motion to quash for the reasons that the Grand Jury which returned the indictment was impaneled in violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, and the Civil Rights Act of the United States Congress which was enacted in pursuance of and for the purpose of carrying out the equal

protection guarantee of said Fourteenth Amendment, being 18 Stat. 336; 8 U.S.C., Paragraph 44.

The Supreme Court of Louisiana, in upholding and affirming the action of the District Court, relying on the unconstitutional and unreasonable construction and interpretation placed upon L.R.S. 15:202 in the case of *State* v. *Wilson*, *supra*, denied defendant of the equal protection clause because it denied him the right of proving a prima facie case of systematic exclusion of negroes from Grand Juries in the Parish of Orleans.

That the United States Supreme Court has determined on many occasions that notorious and undisputed facts of discrimination in qualification of jurors, such as is shown herein and in the transcript filed with this Honorable Court, make out a prima facie case against the constitutionality of the Grand Jury which indicted defendant herein, and that by its unreasonable and unwarranted interpretation of L.R.S. 15:202 in the case of *State* v. *Wilson*, the Supreme Court of the State of Louisiana, deprived defendant of his right to the equal protection of the laws of the State of Louisiana, and of the United States and establishes the nullity of the indictment upon which defendant has been tried and convicted, and his right to make out a prima facie case against the constitutionality of the Grand Jury which indicted defendant by depriving him of his right to put into the record evidence which would have proved the aforesaid undisputed and notorious facts.

It is submitted that defendant is entitled to have the judgment of the Supreme Court of the State of Louisiana, affirming the judgment of the Criminal District Court for the Parish of Orleans, set aside and annulled, and that defendant is entitled to a new trial which should be ordered by this Honorable Court in order to assure defendant of his rights which are guaranteed under the 14th Amend-

ment of the Constitution of the United States and the Civil Rights Act of the United States Congress enacted in pursuance thereto.

Respectfully sbmitted,

GERARD H. SCHREIBER,
Counsel for Petitioner.
GEORGE H. FUST,
Counsel for Petitioner.

Certificate

I hereby certify that a copy of this brief has been served on opposing counsel on this the 23rd day of August 1955.

GEORGE H. FUST.

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES

LOUISIANA REVISED STATUTES OF 1950:

Title 14, Section 42. Aggravated Rape

"Aggravated rape is a rape committed where the sexual intercourse is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:

(1) Where the female resists the act to the utmost, but her resistance is overcome by force.

(2) Where she is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.

(3) Where she is under the age of twelve years. Lack of knowledge of the female's age shall not be a defense."

Title 15, Section 202. Time for Urging Objections to Array; Waiver

"All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard."

Title 15, Section 284. Time and Method of Taking Objections to Indictment; Amendment of Indictment

"Every objection to any indictment shall be taken by demurrer or by motion to quash such indictment, before the arraignment; and every court before which any such objection shall be taken for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, and thereupon the trial shall proceed as if no defect had appeared".

Title 15, Section 286. Defects in Indictments set up in Motion to Quash

"Any defect apparent upon the fact of the indictment, or any defect fatal to the validity of the proceedings may be set up in a motion to quash the indictment, whether such fatal defect be one apparent upon the face of the record, or be such as can be established only by the production of evidence."

Title 15. Section 287. Demurrer and Motion to Quash; Form and Specifications; Time for Disposition

"Both the demurrer and the motion to quash must be in writing, must specify the grounds upon which based and must be filed, tried and disposed of before trial on the merits.

LOUISIANA CONSTITUTION:

Article II, Section 1. Departments of Government

"The powers of the government of the State of Louisiana shall be divided into three distinct departments—legislative, executive, and judicial."

Article II, Section 2. Separation of Departments; Powers

"No one of these departments, nor any person or collection of persons holding office in one of them, shall exercise power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

Article I, Section 9. Criminal Prosecutions; Speedy Public Trial; Jury; Venue; Witnesses; Counsel; Indictment and Information; Double Jeopardy

"In all criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury; provided, that cases in which the penalty is not necessarily imprisonment at hard labor, or death, shall be tried by the court without a jury or by a jury less than twelve in number, as provided elsewhere in this Constitution; provided further, that all trials shall take place in the Parish in which the offense was committed, unless the venue be changed; provided further, that the Legislature may provide for the venue and prosecution of offenses committed within one hundred feet of the boundary line of a parish. The accused in every instance shall have the right to be confronted with the witnesses against him; he shall have the right to defend himself, to have the assistance of counsel, and to have compulsory process for obtaining witnesses in his favor. Prosecution shall be by indictment or information; but the Legislature may provide for the prosecution of misdemeanors on affidavits; provided, that no person shall be held to answer for capital crime unless on a presentment or indictment by a grand jury, except in cases arising in the militia when

in actual service in time of war or public danger; nor shall any person be twice put in jeopardy of life or liberty for the same offense, except on his own application for a new trial, or where there is a mistrial, or a motion in arrest of judgment is sustained."

Article I, Section 2. Due Process; Expropriation of Private Property for Public Purposes; Just Compensation

"No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid".

UNITED STATES CONSTITUTION:

Amendment XIV, Section 1. Citizens of United States

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

UNITED STATES CODE ANNOTATED:

Title 18, Section 243: Exclusion of Jurors on Account of Race or Color

"No citizen possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000."

* * * * * * *

No. 32

Office Supreme Court, U.S.
SEP 6 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1955

JOHN MICHEL, PETITIONER,

vs.

STATE OF LOUISIANA

On Writ of Certiorari to the Supreme Court of the State of Louisiana.

BRIEF ON BEHALF OF THE STATE OF LOUISIANA.

FRED S LeBLANC,
Attorney General

MICHAEL E. CULLIGAN,
Assistant Attorney General

LEON D. HUBERT, Jr.,
District Attorney

ADRIAN G. DUPLANTIER,
First Assistant District Attorney

Criminal Courts Building
New Orleans, Louisiana

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BRIEF ON BEHALF OF THE STATE OF LOUISIANA.

STATEMENT OF ISSUES

May it please the Court:

The facts of this case are succinctly stated by the Supreme Court of Louisiana in the opinion which is reproduced at pages 45-57 of the record. As the opinion well illustrates, the State's case against petitioner on its merits was very strong. In fact, the State produced the direct testimony of two eye-witnesses to the crime, strong and

plentiful corroborative evidence, and a free and voluntary confession by petitioner. This is, thus, not a situation where constitutional rights were violated to strengthen a weak case.

On February 13, 1953, petitioner, a Negro, was indicted for aggravated rape by the grand jury for the Parish of Orleans, which was empaneled to serve from September 2, 1952 to March 2, 1953. (R. 1-2.). On the same day upon which the term of the grand jury ended, to wit; March 2, 1953, the court appointed counsel to represent petitioner. (R. 3.). Although some attempt is made by counsel for petitioner in his brief to show that he was not appointed on this date, there actually is no doubt about it. The minutes of the court evidence the appointment (R. 3); the evidence taken on the question shows it clearly; (R. 30-37), the per curiam of the lower court is unequivocal on the point (R. 40); and the Supreme Court of Louisiana recognized the appointment as having been made on March 2, 1953. (R. 47).

On March 9, 1953, petitioner filed a motion to quash the indictment on the ground that he was deprived of due process and of equal protection of the law because there had been systematic exclusion of Negroes from the grand jury which indicted him. (R. 15-16). The State filed an answer and demurrer to this motion to quash on the ground that it had not been filed within the

time limit established for filing such pleas by the law of Louisiana (R. 17). The trial court sustained the demurrer (R. 18), and this ruling was affirmed by the Supreme Court of Louisiana. (R. 46-48).

It is important to note at this point that the only matter at issue and passed upon by the Louisiana courts was whether petitioner's motion to quash was filed timely. The Louisiana courts did not and could not as the issues were presented, pass upon the question of whether there had been in fact systematic exclusion of Negroes from the grand jury. That question was never before the Louisiana courts, and it is not now before this Court.

Thus, the only issue before this Court is whether the Louisiana procedural statute which requires a motion to quash an indictment on the ground of the illegality of a grand jury to be filed within a definite time limitation violates any federal constitutional right of petitioner.

ARGUMENT

I.

The Louisiana law which provides a time limitation for filling objections to the manner of selecting a grand jury does not violate any federal constitutional provision. La. Rev. Stat. 15:202 and the Wilson case.

In 1928 Louisiana adopted a comprehensive Code of Criminal Procedure. This Code was re-enacted verbatim by the Legislature of Louisiana in 1950 in a general revision of the Louisiana statutes. The 1928 Code became Title 15 of the Louisiana Revised Statutes of 1950. Articles 202 of this Code (or R.S. 15:202) provides as follows:

> "§ 202. TIME FOR URGING OBJECTIONS TO ARRAY: WAIVER
>
> All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard."

It should be noted that while this section does not specifically refer to grand juries, it is contained in a Part of the Code entitled "Grand and Petit Juries". It is thus clear that Article 202 by inclusion in a Part so entitled, deals with both grand and petit juries. As will be seen hereafter, this has always been the interpretation placed upon it by the courts of Louisiana.

In 1943, the Supreme Court of Louisiana, in a case identical in every respect with the instant

case, interpreted Article 202 to mean that an accused could file attacks upon the grand jury only until the third judicial day after the *end* of the grand jury term. *State v. Wilson*, 204 La. 24, 14 S. (2d) 873 (1943), 320 U.S. 714.

In the instant case, the motion to quash was not filed until March 9, 1953, or seven days after the end of the grand jury term, which ended March 2, 1953. Thus it is clear that petitioner filed his pleading too late, and the Supreme Court of Louisiana so held, affirming the *Wilson* case.

Before discussing the constitutional validity of the *Wilson* doctrine, which was affirmed and applied in the instant case by the Louisiana courts, it is well to note a few matters about the *Wilson* case.

1. The Supreme Court of Louisiana in the *Wilson* case clearly recognized that Article 202 as applicable to grand juries should be interpreted to allow an accused three days after the *end* of the grand jury term, because if the time limitation should be interpreted to mean three days after the *beginning* of the six months term of the grand jury, no opportunity to make an attack upon the grand jury would be afforded those persons who were indicted after these three days had elapsed. Thus the Supreme Court of Louisiana recognized the principle that a defendant is entitled to a reasonable time within which to raise federal con-

stitutional questions, and interpreted Article 202 so as to provide such a period.

2. The Supreme Court of the United States granted an appeal in the *Wilson* case, but *thereafter dismissed the appeal in a per curiam reading as follows:*

> "The motion to dismiss is granted and the appeal is dismissed, it appearing that the decision is based upon a non-federal ground adequate to support it." See *Wilson v. Louisiana*, 320 U.S. 714, 64 Sup. Ct. 257, 88 L.Ed. 419 (1943).

Thus, this Court has already passed upon the *precise issue* involved in this case, and has approved the *Wilson* doctrine. Acting under the *Wilson* decision as approved by this Court, the Louisiana Supreme Court held that the motion to quash in the instant case was filed too late. Under the rule announced by the United States Supreme Court in the *Wilson* case, the decision of the Louisiana Supreme Court in the instant case should be affirmed; being "based upon a non-federal ground adequate to support it". The United States Supreme Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with state law. *Edelman v. California*, 344 U. S. 357, 73 Sup. Ct. 293, 97 L.Ed. 387 (1953).

II.

Federal courts, as a general rule, must accept the interpretation placed upon state statutes by state courts.

It is a well-established principle that federal courts must accept the meaning and interpretation placed on a state statute by state courts. The United States Supreme Court has always insisted that state courts be permitted to decide questions of state law, and has even had federal courts decline jurisdiction to await a ruling from a state court. Cf. *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 Sup. Ct. 1098, 87 L.Ed. 1424 (1943); *Williams v. Kaiser*, 323 U.S. 471, 65 Sup. Ct. 363, 89 L.Ed. 398 (1945).

This doctrine does not prevent the Supreme Court of the United States from determining whether the statute *as so interpreted*, violates a federal constitutional privilege. But it does mean that the Supreme Court of the United States will not undertake to place an interpretation upon a state statute different from that given it by the state courts, even though it might not agree with the interpretation. It has been recognized that the only instance in which this general rule will not be applied is where the circumstances give rise to an inference that the state court is guilty of an "evasion"—an interpretation of state law with the specific intent to deprive a litigant of a federal

right. See *Williams v. Georgia*, 349 U.S. 375 at 399, 75 Sup. Ct. 814, 99 L.Ed. advance p. 703 (1955).

III.

The Wilson doctrine is not an "evasion" to deprive petitioner of a federal right.

Petitioner argues that the *Wilson* doctrine is a prohibited "evasion" within the intendment of the rule stated above. This is based on the theory that Article 202 does not mean what the Supreme Court of Louisiana says it means. It should be remembered that the *Wilson* doctrine was not developed for the instant case but has been the law of Louisiana since the *Wilson* decision was approved by this Court thirteen years ago. The Supreme Court of Louisiana adhered to its prior interpretation of Article 202 in this case and its companion case, *State v. Labat and Poret*, and also in a later case, *State v. Chianelli*, 226 La. 552, 76 (S2d) 727 (1954).

It is significant also, as pointed out by the Louisiana Supreme Court in its opinion in this case (R. 47), that the Louisiana Legislature has met many times since the *Wilson* doctrine was enunciated. Not only has the Legislature not changed the *Wilson* doctrine, but it has approved it by reenacting Article 202 of the Criminal Code without change in 1950 as Section 202 of Title 15 of the Lousiana Revised Statutes.

It is clear from the reasoning of the opinion in the *Wilson* case that the Court was not attempting to "evade". In fact quite the contrary is evident. The Louisiana Supreme Court in the *Wilson* case interpreted Article 202 in the most liberal manner possible, permitting a defendant to attack the grand jury until three days after the *end* of the grand jury term instead of three days after the *beginning* thereof. The effect of the decision is to give a defendant more time, not less time, to raise federal questions. In fact, the meticulous concern of the Louisiana Supreme Court for the protection of federal rights is the central theme of the decision. For example, the following language from the opinion in *Wilson* on rehearing is significant:

> ". . . Obviously, under the construction requiring the filing of the motion to quash within three judicial days after the Grand Jury is drawn, the defendant would not be afforded an opportunity, through proper pleadings, to challenge the legality of the drawing and selecting of the jury, the array or venire. Therefore, this Court, by giving Article 202 such construction would unquestionably make its provisions unconstitutional under our State and Federal Constitutions because of a denial of due process of law.
>
> "While the constitutionality of Article 202 of the Code of Criminal Procedure is not attacked in this case, it is clear that its provisions apply to all persons charged with

crime regardless of color, race, or previous condition of servitude and, therefore, it does not conflict with the provisions of the articles of the State and Federal Constitutions guaranteeing persons the equal protection of the law. Neither does the constuction which we have placed upon its provisions in the majority opinion deny to any person charged with Violating a criminal law, the equal protection of the law because of race, color, or previous condition of servitude. The interpretation which we have placed upon the statute is in keeping with our previous holdings, in cases where persons of the white race were tried for criminal offenses and failed to comply with the provisions of Article 202 of the Code of Criminal Procedure in attacking the legality of the drawing and selecting of the Grand Jury, that the plea came too late and would not be considered." *State v. Wilson*, 204 La. 24, at 75-76, 14 S. (2d) 873 (1943).

In *State v. Chianelli*, supra, decided after the instant case, this concern about federal rights was again expressed by the Supreme Court of Louisiana in these words:

"We are conscious of the fact that under the interpretation given to Article 202 by the Wilson case and others following it an accused can indefinitely delay the trial of his case by waiting until the date fixed for trial to object to the petit jury array or venire. However, to avoid these unnecessary delays Article 202 of the Code of Criminal Proce-

> dure requires legislative, not judicial, action; but the Legislature in amending this article should be careful not to incorporate in it any provision that would subject the statute to an attack on the ground of denial of due process of law." *State v. Chianelli*, 226, La. 552, at 559-560, 76 S. (2d) 727 (1954).

Furthermore, an analysis of the cases on the subject of "evasion" reveals situations so strained as to amount practically to bad faith on the part of state courts. Thus in *Rogers vs. Alabama*, 192 U.S. 226, 24 Sup. Ct. 257, 48 L.Ed. 417 (1904), defendant's motion to quash the indictment on the ground of systematic exclusion of Negroes was stricken by the trial court. The Supreme Court of Alabama affirmed the trial court's action under a statute which provided that the court could strike from the record pleadings which were unnecessarily prolix. The United States Supreme Court reversed the conviction, pointing out that the entire motion setting up a constitutional right was only two pages in length. Manifestly, there is absolutely no similarity between the action of the Alabama Supreme Court in *Rogers* and that of the Louisiana Supreme Court in *Wilson* and in the instant case.

As a matter of fact, it is submitted that "evasion" can be found only in the *application* of a state statute to a particular situation, as in *Rogers*, not in the *interpretation* of a statute as in *Wilson*,

since an interpretation necessarily affects all litigants alike and applies in all cases, whether or not they involve federal rights.

Certainly it would be more than unjust to brand the concern of the Louisiana Supreme Court for the protection of federal rights which is manifest in its opinions in *Wilson* and in the subsequent cases involving Article 202 as an "evasion". So obvious is it that the *Wilson* decision does not involve an "evasion" that this Court dismissed the appeal in that case with a per curiam opinion.

IV.

R.S. 15:202 as interpreted in the Wilson case is a valid procedural statute which does not unreasonably interfere with the assertion of federal rights.

It is clear that there must be some time in the course of a criminal proceeding after which it will be too late to raise certain pleas. Otherwise, a defendant could wait until he is convicted before raising his objection, and thus get two or more trials instead of one. As Mr. Justice Clark said in his dissent in *Williams v. Georgia*, 349 U. S. 375 at 403, 75 Sup. Ct. 814, 99 L.Ed. advance p. 703 (1955):

> "A State may be influenced by the unfairness of allowing the litigant who remains silent two chances for acquittal while giving the diligent litigant only one. And orderly

administration of the laws often imposes hardships upon those who have not properly preserved their rights."

Louisiana has decided that the proper limitation upon the filing of a plea attacking a grand jury is three days after the expiration of the term of the grand jury. This gives everyone at least three days, and in most instances more than three days, to attack the grand jury. The motion to quash is itself a simple document, and certainly no great amount of research or study is required to raise the issue of systematic exclusion. See, for example, the simplicity of the very document filed in this case. (R. 15-16). Thus, little or no preparation or study was required by petitioner's counsel.

What is Louisiana's purpose in establishing this time limitation? The *Wilson* case gives two answers to this question:

1. "This Court, in the case of State v. Strickland, supra, in interpreting the provisions of Section 11 of Act No. 44 of 1877, and, in State v. White, supra, in applying the provisions of Article 202 of the Code of Criminal Procedure, pointed out that the Legislature intended to require an accused to file his objections and pleas to any defect or irregularity in the drawing or the selecting of a juror or jury or venire or array within a certain period of time, in order to prevent the defendant from going to trial on the merits, and, in the

event he were convicted, assure himself of another trial by withholding his pleas as to any error or irregularities in the drawing and selecting of the jury, venire and array. It is apparent that the Legislature took into consideration the fact that timeliness in filing such pleas was necessary to the effective and proper administration of justice by the State."

2. "Persons charged with offenses under indictments are usually not brought to trial for months and sometimes for years after the time when the members of the grand jury who returned them have gone out of office. The persons who composed the array from which the venires were drawn are very likely to be scattered over a wide area within a reasonable time after the grand jury term ends. If a defendant, under the law, were granted the right to raise this type of objection and file this character of pleading at any time before trial, it is easy to see that in innumerable instances the State would be put at serious disadvantage in making its proof and this would result in a great many guilty persons escaping justice. Apparently, our Legislature had this in mind because under Section 16 of Act No. 135 of 1898, the defendant was granted the right to file these types of objections and pleadings at any time before the beginning of the trial of the case. The members of the Legislature in 1928 changed that statute

> by placing into the Code of Criminal Procedure Article 202." *State v. Wilson*, 204 La. 24, at 47, 48; 14S. (2d) 873 (1943).

Moreover, the state's requirement of an early raising of the plea gives the state a better opportunity to correct whatever errors might have been made.

Thus, it is submitted that the *Wilson* doctrine is not a sinister anti-federal doctrine. It is a reasonable, understandable, properly motivated doctrine, adopted for the purpose of fostering the orderly administration of justice. It is applicable not solely to Negroes, nor to motions to quash based upon federal rights. It applies to all persons and to all types of objectons.

It is well settled that state procedural devices will be upheld by this Court if they provide a reasonable opportunity to raise federal questions. Thus, in *Parker v. Illinois*, 333 U.S. 571, 68 Sup. Ct. 708, 92 L.Ed. 886 (1948), this Court upheld an Illinois practice which established a waiver of federal questions where an appeal was taken to an intermedite appellate court rather than to the Illinois Supreme Court. The Court said:

> "When federal rights are involved, it is, of course, for this Court finally to determine whether the failure to follow the procedure designated by a State for their protection constitutes a waiver of them. *Davis v. O'Hara*, 266 U.S. 314; *Central Union Co. v. Edwards-*

ville, supra. The Court said in the *Edwardsville* case that when the waiver is founded on a failure to comply with the appellate practice of a State, the question turns on whether that practice gives lit gants 'a reasonable opportunity to have the issue as to the claimed right heard and determined' by the State Court. 269 U.S., pp. 194-195." (333 U.S. 571 at 574).

In *Bailey v. Commonwealth*, 193 Va. 814, 71 S.E. 2d 368 (1952), the Supreme Court of Virginia affirmed the trial court's decision rejecting a motion attacking the grand jury on the ground of discrimination, holding that the attack was not timely. *This Court denied certiorari.* (344 U.S. 886, 73 Sup. Ct. 186, 91 L.Ed. 686, 1952).

Yakus v. United States, 321 U.S. 414, 64 Sup. Ct. 660, 88 L.Ed. 834 (1944), involved a federal statute somewhat similar to Article 202 of the Louisiana Code of Criminal Procedure. The Emergency Price Control Act of 1942 provided that the validity of a price regulation could not be attacked in a criminal proceeding for violation thereof unless a protest was filed with the Administrator within a sixty-day period. Defendant failed to file a protest timely and was convicted. In affirming the conviction the United States Supreme Court said:

"No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil

cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *O'Neil v. Vermont*, 144 U. S. 323, 331; *Barbour v. Georgia*, 249 U.S. 454, 460; *Whitney v. California*, 274 U.S. 357, 360, 362, 380. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. *Seaboard Air Line Ry. Co. v. Watson*, 287 U.S. 85. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis, J. concurring in *Whitney v. California*, *supra*, 389, and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare *Woolsey v. Best*, 299 U.S. 1 with *Ex parte Siebold*, 100 U.S. 371." (321 U.S. 414, 444-445).

The opinion in the *Yakus* case (Footnote 3, 321 U.S. at p. 435) cites a number of other federal cases in which limited periods for resort to administrative relief as a prerequisite to proceeding in court have been held to be sufficient. In *Bellingham Bay & B.C.R. Co. v. New Whatcom*, 172 U.S. 314, 19 Sup. Ct. 205, 43 L.Ed. 460 (1899), a ten day period for such action was held reasonable.

In view of the simplicity of the pleading required to urge the illegality of a grand jury, it cannot be seriously argued that a statute which

always affords at least three days and generally much longer period is unreasonable. (Compare *Avery v. Alabama*, 308 U.S. 444, 60 Sup. Ct. 321, 84 L.Ed. 377 (1940), in which the Supreme Court of the United States held that a delay of less than three days between the appointment of counsel and the *trial* in a capital case was a reasonable time.) As this Court pointed out in *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 Sup. Ct. 330, 78 L.Ed. 674 (1934), a state is "free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . . Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." See *Stein v. N.Y.*, 346 U.S. 156, 73 Sup. Ct. 1077, 97 L.Ed. 1522 (1953), approving the *Snyder* decision.

It is submitted therefore that Article 202 as interpreted in the *Wilson* case establishes a sound and valid procedural step, and that it provides a reasonable opportunity for anyone — white or black — to raise any question, including the question of systematic exclusion, with respect to grand juries.

CONCLUSION

It is respectfully submitted that this Honorable Court does not have jurisdiction of this case, the decision of the Louisiana Supreme Court being based on an adequate non-federal ground (*State v. Wilson*, supra); that the writ in this case should therefore be declared to have been improvidently granted; and that the judgment of the Louisiana Supreme Court should be affirmed.

FRED S. LeBLANC,
Attorney General

MICHAEL E. CULLIGAN,
Assistant Attorney General

LEON D. HUBERT, Jr.,
District Attorney

ADRIAN G. DUPLANTIER,
First Assistant
District Attorney

CERTIFICATE

This is to certify that a copy of this brief has this day been delivered to the Hon. Gerard H. Schrieber and the Hon. George H. Fust, Pere Marquette Bldg., New Orleans, Louisiana, Attorneys for the petitioner, by depositing the same and addressing to him, as aforesaid, in the United States mail at New Orleans, Louisiana.

New Orleans, Louisiana, this _____ day of September, 1955.

Assistant Attorney General

AUG
HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 36

EDGAR LABAT,

Petitioner,

v.

STATE OF LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR PETITIONER

RUDOLPH F. BECKER, JR.,
FELICIEN Y. LOZES,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 36

EDGAR LABAT,

Petitioner,

v.

STATE OF LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF ON BEHALF OF PETITIONER, EDGAR LABAT

Opinions Below

The opinion of the Supreme Court of Louisiana is reported in *State of Louisiana v. Edgar Labat & Clifton Alton Poret*, No. 41718, 226 La. 201, 75 So. 2d. 333.

Jurisdiction

The judgment of the Supreme Court of Louisiana was handed down on July 2, 1954. *State v. Labat, et al*, 226 La. 201, 75 So. 2d. 333. Rehearing was denied on October 5, 1954. The petition for writ of certiorari was filed on December 31, 1954. The petition was granted on February

28, 1955, 348 U.S. 950; 75 S.Ct. 444, 99 L.Ed. 307. No. 396 Misc. The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1257(3).

Statute and Constitutional Provisions Involved

Article 202 of the Louisiana Code of Criminal Procedure — Louisiana Statutes Annotated, R. S. 15:202:

Time for urging objections to array; waiver

All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, *heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn*, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard.

CONSTITUTION OF THE UNITED STATES

Amendment XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the assistance of counsel for his defense.*

Questions Presented

1. Whether petitioner was denied his constitutional right to be represented by effective counsel.

2. Whether petitioner intelligently waived his right to challenge the venire under the circumstances of being represented by ineffective counsel in a complex and difficult legal situation.

3. Whether this Court should assume jurisdiction in this case because there was no independent and adequate state ground supporting the conclusion reached by the State of Louisiana in denying petitioner his right to challenge the grand jury on the ground of systematic exclusion of negroes therefrom.

F. In the event that this Court should see fit to remand the case of the co-defendant, Clifton Alton Poret, on grounds not asserted herein, should not the Court also remand this case.

Statement of the Case

On December 11, 1950, the grand jury for the Parish of Orleans, State of Louisiana, returned an indictment against petitioner Edgar Labat, a colored male, and against one Clifton Alton Poret, also a colored male, charging them with the crime of aggravated rape, denounced by Article 42 of the Louisiana Criminal Code, Louisiana Statute Annotated R. S. 14:42. The victim of the alleged rape was alleged to be one Helen Rajek, a white female, and the crime was allegedly committed on November 12, 1950.

The petitioner, Edgar Labat, was arrested in New Orleans a few days after the date of the alleged crime. The co-defendant, Poret, was not arrested until almost two years following the commission of the alleged crime.

On January 3, 1951, defendant, Edgar Labat, was brought before the Court *for arraignment without counsel*. The minute entries show that he pleaded "not guilty". In response to a query by the Court, defendant Labat informed the Court that his family was attempting to hire counsel for his defense (Tr. 1). Two days later on January 5, 1951, the defendant Labat was again brought before the Court, and the Court appointed E. I. Mahoney, Esq. as counsel to represent him (Tr. 1). It is to be noted that at this time the co-defendant, Poret, was not before the Court and had not been arrested or apprehended. After this appointment of counsel by the Court, nothing whatever was done, according to the record, by either the State or the defense for more than one year. *The court-appointed counsel for Labat did nothing whatever in his behalf. He filed nothing until one year and twenty-four (24) days later*, namely on January

29, 1952, *when he filed a Motion to Withdraw as Counsel* (Tr. 2). On this day the State moved for a continuance, which was granted. The case was again continued to be reset on Motion of the State on March 25, 1952 and on June 17, 1952. It is not clear from the record exactly when petitioner's employed counsel, Mr. G. Wray Gill, came into the case. In any event, it was not until October 27, 1952, almost one year and eleven months subsequent to the indictment of petitioner Labat, that his co-defendant, Clifton Alton Poret, was brought before the Court for arraignment (Tr. 3).

On November 7, 1952, petitioner Labat, through his counsel, G. Wray Gill, filed a Motion to Quash the indictment against him on the grounds that there had been a systematic, unlawful and unconstitutional exclusion of negroes from the general venire and grand jury panel and Grand Jury which returned the indictment against him. *The Motion alleged* that the exclusion existed because of race or color, and *that a negro has never served on a Grand Jury in the Parish of Orleans.* Subsequently, on November 18, 1952, petitioner Labat, through his counsel, G. Wray Gill, filed a supplemental and amended Motion to Quash, which after re-alleging all of the facts contained in the original Motion to Quash, alleged that petitioner was a member of the colored or negro race, and that although petitioner was represented by a court-appointed counsel since shortly after his arraignment, he was not represented by his employed counsel until (the date is not made clear from the record), but that under the circumstances and because of the fact that the alleged principal and co-defendant was not in the jurisdiction of the Court or arraigned, it was not consistent or possible for him to have filed his Motion to Quash prior to the date on which he had filed said Motion.

To both the original and supplemental Motions to Quash, the State of Louisiana filed *Demurrers* contending that the grand jury, which indicted petitioner, was constitutionally selected without discrimination or systematic exclusion of any race, group or class of people, and further that the *Motion to Quash was filed too late* under the provisions of *Article 202 of the Louisiana Code of Criminal Procedure, L. S. A., R. S. 15:202.*

Petitioner Labat also filed a Motion attacking the constitutionality of said *Article 202. The Court overruled all of petitioner's Motions without permitting petitioner to introduce any evidence in connection with the alleging of systematic exclusion of negroes from the grand jury, on the ground that petitioner's Motion came too late to be considered. See Judge's Percuriam to Bills of Exceptions Nos. 3, 4, 5 & 6* (Tr. 50). Proper Bills of Exception were reserved and petitioner was ordered to stand trial.

On February 24, 1953, your petitioner and his co-defendant were tried and on February 27, 1953 the jury returned a verdict of guilty as charged against both your petitioner and his co-defendant. During the course of the trial, petitioner reserved and perfected twenty-seven bills of exception. These bills were reserved in accordance with the provisions of *Article 501 of the Louisiana Code of Criminal Procedure, L. S. A., R.S. 15:501*, providing that whenever a bill of exception has been reserved in any criminal proceedings in which more than one defendant is on trial, there shall be presumed, unless the contrary clearly appears, that the bill was reserved by all of the defendants on trial.

On March 13, 1953, petitioner filed a Motion for a new trial and on March 23, 1953, the Motion for a new trial was denied and bills of exception were reserved. On this same day, petitioner filed a Motion for a Suspensive Appeal to the Supreme Court for the State of Louisiana, which Mo-

tion was granted. Petitioner and his co-defendant were then on this same day *sentenced to death in the electric chair.*

On July 2, 1954, the Supreme Court of Louisiana affirmed and sustained the conviction and sentence of the trial court. Subsequently, petitioner filed an application for rehearing with the Supreme Court of Louisiana, which application for rehearing was refused and denied on October 5, 1954. *State* v. *Labat, 226 La. 201, 75 So. 2d 333.*

A petition was then filed with the Supreme Court of Louisiana for a stay of execution in order that petitioner might file an application for a Writ of Certiorari to the Supreme Court of the United States, which petition for stay of execution was granted on the 8th day of October, 1954.

Petitioner filed application for Writ of Certiorari with the Supreme Court of the United States on December 31, 1954. The petition was granted on February 28, 1955. *348 U. S. 950, 75 S. Ct. 444, 99 L. Ed. 307, No. 396 Misc.*

Summary of Argument

I. Petitioner was denied due process of law by the State of Louisiana in that from the time of his arraignment to more than one year later, he was without the assistance of "effective counsel". The court-appointed counsel did absolutely nothing in his behalf during the entire time that counsel's name was of record. The Louisiana Court then held that petitioner's right to challenge the Grand Jury that indicted him on the grounds of systematic exclusion of negroes had prescribed during this period of time.

II. The legal issue confronting petitioner during the time that he was without the assistance of "effective counsel" was of such complexity that he could not have intelligently waived his rights.

III. There was no independent and adequate state ground supporting the conclusion reached by the trial judge and the Supreme Court of Louisiana in denying petitioner the right to challenge the Grand Jury on the ground of systematic exclusion of negroes. The Supreme Court of Louisiana has in subsequent cases admitted that its construction of the Articles of the Louisiana Code of Criminal Procedure, under which petitioner's rights were denied, was a "strained construction" and amounted to "judicial legislation."

IV. In the event that this Court should see fit to remand the case of the co-defendant herein, so as to permit co-defendant to challenge the validity of the Grand Jury on some ground not asserted by petitioner herein, then the Court should also remand petitioner's case. A motion to set aside the venire, if sustained, on behalf of co-defendant would have the effect of declaring the venire bad and illegally drawn and the jurors composing it no longer jurors, and no indictment by them would stand.

Argument

I.

Petitioner Labat respectfully submits to this Honorable Court that he was denied due process of law in violation of his rights under the *Fourteenth Amendment to the Constitution of the United States* in that for a period of approximately one year, during which time his right to challenge the array, the venire and the grand jury which indicted him on the ground of systematic exclusion of members of his race, was prescribing under the interpretation given to *Article 202 of the Code of Criminal Procedure of Louisiana, he was without "effective counsel".*

The facts, as disclosed by the record, indicate that petitioner, Labat, was arraigned on January 3, 1951 without

counsel, at which time he pleaded "not guilty". In response to questioning by the Court, he informed the Court that his family was in the process of hiring counsel for his defense. The Court then gave petitioner two days in which to obtain counsel. It must be pointed out here that petitioner Labat is a negro who had worked as an orderly in a hospital, and whose family resided in the neighboring State of Mississippi. He was, therefore, of very limited means and under the circumstances, the hiring of competent counsel by members of his family was a difficult matter. The record in no way indicates that the Court impressed petitioner with the fact that his right to challenge the grand jury was prescribing with the lapse of time. The record merely discloses that two days later, on January 5, 1951, the Court appointed Mr. E. J. Mahoney to represent petitioner. Mr. Mahoney was an elderly lawyer, who was then in poor health, a fact which was known to the Court as Mr. Mahoney's office was in a small house directly across the street from the front steps of the courthouse, and Mr. Mahoney was an almost daily visitor to the Court. The record indicates with an eloquent silence that Mr. Mahoney's appointment by the Court was merely formal and made by the Court solely to satisfy the record and show that petitioner was represented by counsel. The record discloses that Mr. Mahoney did *nothing whatever* on behalf of defendant for a period of more than one year. In fact, the only appearance made in the case by Mr. Mahoney from the time of his appointment on January 5, 1951 until January 29, 1952 was a Motion by Mr. Mahoney *to be allowed to withdraw his name as counsel of record.*

The reason for the court-appointed attorney's inaction is not disclosed by the record. Whether it was because of ill health or some other reason is not indicated. It is a fact which was known to the trial judge who appointed the attorney that the court-appointed attorney was confined to

his bed with a heart ailment on May 12, 1951 and there he remained for a period of approximately seven months before he resigned from the case. Certainly during this period petitioner was *in fact* without counsel.

It is submitted that the absence in the record of any attempt by petitioner's court-appointed attorney to assert his rights under the Constitution conclusively shows that the court's appointment of an attorney was merely formal and did not *in fact* give him the assistance of counsel at these crucial states of the proceedings against him, and, therefore, denied him due process of law.

> The right to counsel * * * is * * * protected by the Fourteenth Amendment. *Williams v. Kaiser, 323 U. S. 471, 65 S. Ct. 363, 89 L. Ed. 389.*

Your Honors have also held that the constitutional guarantee of a right to counsel cannot be satisfied by *mere formal appointment* of counsel. *Avery* v. *Alabama* (1940), 308 U. S. 444, 84 L. Ed. 377, 60 S. Ct. 321. It has also been held that it is the duty of a Court to assign counsel in a proper situation and that "* * * that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case". *Powell* v. *State of Alabama*, 287 U. S. 45, 53 S. Ct. 55 (65), 77 L. Ed. 158.

The right to counsel includes the right to have "effective counsel" assigned. *Hawk* v. *Olson* (1945), 362 U. S. 271, 90 L. Ed. 61, 66 S. Ct. 166; *White* v. *Ragen*, 324 U. S. 760, 764, 89 L. Ed. 1348, 1352, 65 S. Ct. 978.

Petitioner submits that an application of the above rule was accurately made by the Court of Appeals of the District of Columbia, in a case wherein attorneys appointed by the Court handled the case in a careless manner without even examining the transcript and summoning available witnesses. The Court held that "in the circumstances, the

failure of counsel to produce all available evidence in a case involving the life of an accused should not be held against him. It would be a strange system of law which first assigned an inexperienced or negligent counsel in a capital case and then made counsel's neglect a ground for refusing a new trial. The right to counsel is not formal but substantial." *Johnson* v. *U. S.*, 110 F. 2d 562 (1940).

> The right to assistance of counsel means more than the nominal designation by the Court of a lawyer to represent the accused and the mere perfunctory participation in the trial of such appointee as attorney for the defendant. It means rather that the accused is entitled to the good faith and assistance of a lawyer in defending the accused against the indictment on which he is to be tried. *U. S. ex rel. Foley* v. *Ragen*, 54 F. Supp. 265 (1943).

The holding of the Court in *U. S. ex rel. Hall* v. *Ragen*, 60 F. Supp. 820 (1945) is also interesting to note. In this case, at arraignment the Court appointed an attorney for the defendant who never interviewed him or *took part in any subsequent proceedings*. Thereafter, a doctor, who was a disbarred attorney, represented the defendant at a trial. The Court concluded that the defendant was not afforded a fair trial in accordance with the Fourteenth Amendment to the Constitution of the United States.

Petitioner therefore submits that the failure of the Court to provide "effective counsel" during a period when according to that same court's interpretation of the procedural law of Louisiana, the time within which he might assert a Federal Constitutional right, prescribed, denied him of due process of law.

II

The legal issue with which petitioner was faced was of such complexity and difficulty that he could not have intelligently waived his rights to assert same.

At the outset it must be noted that petitioner is an ignorant negro, born and reared in the State of Mississippi, who came to New Orleans upon reaching manhood, and obtained a job as a hospital orderly.

Petitioner Labat was an alleged accessory to the alleged rape and nowhere in the record is there any testimony indicating that petitioner Labat was a principal in the commission of the alleged crime. There is nothing in the record to indicate that your petitioner Labat actually committed a rape, he was indicted as a principal only under the theory of Louisiana law that an accessory may be indicted and tried along with a principal as a principal.

It is to be noted that from the time that petitioner was arraigned, and the court-appointed attorney was named to represent him, his right to challenge the venire and the grand jury on the ground of systematic exclusion of members of his race was slowly prescribing as each day passed according to the interpretation placed upon various *Articles of the Louisiana Code of Criminal Procedure* by the Supreme Court of Louisiana. These are interpretations which, as is pointed out in an article in the Tulane Law Review, "are so phrased as to give rise to such conflicting interpretations that a defendant with bonafide grounds for objection, unable to determine which article is applicable to his case, or just what limit the applicable article imposes, may unwittingly allow the time for urging his objection to lapse by relying on the wrong Code Article or giving it a different interpretation from that of the Supreme Court". *18 Tulane Law Review, 462, 481 (1944).*

Professor Dale E. Bennett of Louisiana State University, an outstanding authority on Criminal Law and Procedure in Louisiana, sets forth the difficult legal situation in a recent article from which we quote:

> Another source of considerable difficulty and dissatisfaction has been the requirement of Article 202 that objections to the general venire or jury lists must be urged "before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard". This article is apparently aimed at securing prompt objections to jury venires and jury lists, but it presents a cure which is distinctly worse than the situation which it purports to remedy. Insofar as it relates to objections to the grand jury panel there is apparent conflict with other articles which permit the filing of objections to the indictment at any time prior to the commencement of the trial. As applied to the time for objecting to petit jury venires, it states a rule which also frequently proves unworkable.

The method of challenging the validity of an indictment or information, that is, by demurrer or motion to quash, is clearly spelled out in the Code of Criminal Procedure. *However, the time for filing such preliminary pleas is confusingly stated in the various codal provisions.* Article 284 states that such objections must be taken "before the arraignment". Article 287 declares that the demurrer and motion to quash "must be filed, tried and disposed of before trial on the merits." Even more latitude is apparently contem-

plated by the declaration in Article 253 that objections to the indictment must "be made prior to the commencement of the trial or at such time thereafter as the court in its discretion permit." *In cases where the indictment is defective by reason of the illegal composition of the grand jury list, added confusion is injected by Article 202. Ignoring the possible complications of Article 202,* certain fairly definite conclusions emerge from a careful analysis of the above provisions. The defendant's unqualified right to file a demurrer or motion to quash the indictment is controlled by Article 284 which directs the filing of such motions before pleading to the merits at the arraignment. After the accused has entered a plea to the merits he may, in the discretion of the trial judge, withdraw that plea to plead otherwise. In such cases, Article 287 will generally control and the substituted motion to quash must be tried and disposed of before the trial on the merits. While Article 253 authorized the judge to permit the filing of a motion to quash after the trial is under way, such discretionary permission will seldom be granted since the resulting mistrials are not favored.

To the veteran criminal lawyer or trial judge, the above pattern is fairly well set. However, the inexperienced lawyer or judge is faced with a rather perplexing situation—as evidenced by the fact that cases involving this matter are presented at almost every term of the Supreme Court. A great deal of confusion could be avoided by a very simple statement as to the latest point at which objections to the indictment may be filed as of right, and the latest point at which they may be permitted within the sound discretion of the trial judge. Possibly a rephrasing and combina-

tion of Articles 284 and 287 would effect such clarification. At any rate, Article 202 should be eased out of the picture in this regard.

Louisiana Criminal Procedure—a critical appraisal, XIV Louisiana Law Review - 17 - 20 - 21, December, 1953.

It is to be noted that the above pattern, which the Professor states would be "well set to the veteran criminal lawyer or trial judge", ignored "the possible complication of *Article 202.*" (Page 19 last three lines). Yet your petitioner was denied his right to challenge the array, the venire or the grand jury that tried him on the ground of systematic exclusion of negroes for the reason that, according to the trial judge and the Supreme Court of Louisiana, his motion to quash was filed "too late", according to the provisions of *Article 202.*

In view of the above, it is submitted that your petitioner could not have intelligently waived his right to challenge the grand jury and the venire at a time when although he had the nominal assistance of a *court-appointed counsel*, he was *in fact* without the assistance of counsel to advise him of his right timely to make the challenge, as the *court-appointed counsel* did nothing whatever on petitioner's behalf.

III

This Court should assume jurisdiction in this case because there was no independent and adequate state ground supporting the conclusion reached by the State of Louisiana in denying petitioner his right to challenge the array, the venire and the grand jury on the ground of systematic exclusion of negroes therefrom.

As was stated by the minority of the Court in the recent case of *Williams v. Georgia*, ——U.S. ——, 75 S. Ct. 814,

828, 99 L. Ed. 702 (1955), a purported state ground is not independent and adequate in two instances. First where the circumstances give rise to an inference that the state court is guilty of an evasion—an interpretation of state law with the specific intent to deprive a litigant of a federal right. Second, where the state law, honestly applied though it may be, and even dictated by the precedents, throws such obstacles in the way of enforcement of federal rights that it must be struck down as unreasonably interfering with the vindication of such rights.

It is submitted that both of the above tests are applicable in petitioner's case. The record indicates that petitioner's motion to quash the indictment was held by the trial court and the Supreme Court of Louisiana to have been filed "too late", according to the provisions of *Article 202 of the Louisiana Code of Criminal Procedure*. Petitioner then urged by way of a motion in writing that said Article was patently unconstitutional. Said Article provides as follows:

> All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged before the expiration of the *third judicial day of the term for which said jury shall have been drawn*, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard.
>
> *Louisiana Statutes Annotated, R.S. 15:202.*

If the Article be interpreted *as passed by the legislature*, "the third judicial day of the term for which said jury shall have been drawn", had expired long before the alleged crime was committed. The Grand Jury which indicted

your petitioner was impaneled on September 5, 1950 and, therefore, under the *Article as written*, your petitioner had until *September 8, 1950* in which to file the objection to the array or venire.

This he obviously could not do as the alleged crime was not committed until more than two months later on *November 12, 1950*, and defendant was not indicted until *December 11, 1950*, more than three months after the date for objecting to the array or venire had elapsed, *according to the Article as written*.

However, the Louisiana Supreme Court in the case of *State* v. *Wilson*, 204 La. 24; 14 So. 2d., 873 interpreted the above plain language to mean the *third day after* the end of the term of the Grand Jury.

This interpretation by the Supreme Court gave rise to the following comment in the *Tulane Law Review* branding it as an interpretation which can be used as a "means of sidetracking the issue of race discrimination in selecting juries".

We quote:

> "Today when grand jury terms and court terms do not coincide, the language of Article 202 fails far short of making clear the legislative intent with regard to this important limit on a defendant's rights. As long as the articles of the Code are so phrased as to give rise to such conflicting interpretations, a defendant with *bona fide* grounds for objection, unable to determine which article is applicable to his case or just what limit the applicable article imposes, may unwittingly allow the time for urging his objection to lapse by relying on the wrong Code article or giving it a different interpretation from that of the Supreme Court. *In its present ambiguous form, this Article is one source of confusing technicalities of procedure in*

criminal cases which can be used as a means of side-tracking the issue of race discrimination in the selecting of juries. To protect the rights of an accused person in Louisiana, it is suggested that the legislature clarify *Article 202*, making plain its scope and the extent of the time limitation it imposes. The general explanation in the present Article of the type of objection covered is inadequate, particularly if the interpretation of prior statutes on the same subject cannot be relied on. Just what objections must be urged within the strict time limit of *Article 202* rather than the more extended period allowed by subsequent articles on quashing indictments generally should be made clear. The apparent conflict among the subsequent articles with regard to the time during which indictments may be quashed on grounds other than those included in *Article 202* might well be resolved by the legislature." *18 Tulane Law Review 462 (481), 1944.*

The "reductio and absurdum" of the strained interpretation of *Article 202* was finally reached in the most recent Louisiana case of *State* v. *Chianelli*, 226, La. 552, 76 So. 2d. 727, (1955), by the *Louisiana Supreme Court.*

We quote from this opinion:

> We concede that this Court's interpretation of Article 202 in the Wilson case may have been somewhat strained. We concede likewise that it might be considered by some to be judicial legislation rather than judicial interpretation. Nevertheless, this Court's construction and interpretation of Article 202 in the Wilson case has been approved by this Court in two recent cases, *State* v. *Michel*, 225, La. 1040, 74 So. 2d. 207 and

State v. Labat, et al., 226 La. 201, 75 So. 2d. 333.

Article 202 of the Code of Criminal Procedure requires legislative not judicial action; but the Legislature in amending this Article should be careful not to incorporate in it any provision that would subject the statute to an attack on the ground of a denial of due process of law.

It is to be noted that the Louisiana Supreme Court quotes your petitioner's own case as authority for the interpretation of *Article 202*, which the Court itself concedes "somewhat strained" and which amounts to "judicial legislation rather than judicial interpretation".

The position above taken by petitioner is supported by an excellent comment in the Louisiana Law Review of June, 1955.

> *The present interpretation of Article 202*, as established by the Wilson case and applied to objections to petit jury venires in the Chianelli case, *is subject to criticism*. This construction in regard to objection to grand jury venires, *fails to provide for cases in which an accused is not assisted by counsel until on or after the third judicial day after the expiration of the grand jury term.*

* * * * * * *

The basic problems of statutory construction is one of ascertaining the intent of the legislature. In relation to Article 202, the generally applicable canons of statutory construction would lead to a different conclusion from that announced in the Wilson case. Thus, under the "plain meaning" rule or "rule of literalness", it is difficult to say how the phrase "of the term" could be construed as meaning "after the term." However,

since a literal interpretation would lead to the incongruous result of depriving many accused persons of the right of objecting to jury venires, the plain meaning of the langage of the statute should not be relied upon as conclusively proving the legislative intent.

. . . . . .

However, it is submitted that the court in the Wilson case *was guilty of judicial legislation.* Also, since the Supreme Court can at any time decide that the rule of the Wilson case is illogical and revert to the prior rule an accused person is at the present somewhat insecure in waiting until after the first three judicial days of the term to raise objections to the jury venire. Possibly the only solution lies in the amendment of Article 202 by the legislature. *Time for Urging Objections to Jury Lists and Venires: Article 202, Louisiana Code of Criminal Procedure. XV Louisiana Law Review 749, 751, 754.* (Italics by writer of brief.)

A complete statement of the historical backgrond of *Article 202* is presented by the late Chief Justice O'Neill of the Louisiana Supreme Court in a lengthy dissenting opinion of the case of *State* v. *Anthony Wilson* 204, La. 24, 14 So. 2d. 873, 885 (1943). Justice O'Neill concludes his opinion with the statement that the construction of *Article 202* by the majority of the Court and by the trial judge in that case "is not only contrary to the wording of the Statute and contrary to the jurisprudence on the subject but is, in fact, an impossible construction."

It is the same "impossible construction" that was relied on by the trial judge and the Supreme Court of Louisiana in your petitioner's case. See *State* v. *Labat* 226, La. 201; 75 2d. 333 (337).

We quote briefly from the Chief Justice's dissenting opinion:

> The limitation as expressed in the article (Article 202) is not applicable to this case; *but the trial judge has made the limitation applicable to this case by giving the limitation a meaning which its wording does not express, and thus, has denied the defendant the right even to make the objection that he was denied the equal protection of the laws. State* v. *Wilson, Supra* at 14 So. 2d 889. (Italics by writer of this brief).

It is, therefore, submitted that there was no independent and adequate state ground supporting the conclusion reached by the State of Louisiana in denying petitioner the right to challenge the array, the venire and the grand jury on the ground that he was denied the equal protection of the laws. The circumstances surrounding this case certainly give rise to an inference that the law of the State of Louisiana, namely *Article 202 of the Code of Criminal Procedure* was interpreted with the specific intent to deprive your petitioner of a Federal right. Even assuming that the State Court is not guilty of an evasion and that the law of Louisiana was honestly applied, and even dictated by precedents, it is clear that the State law as interpreted by the Supreme Court in your petitioner's case throws such obstacles in the way of enforcement of his Federal rights that it must be struck down as unreasonably interfering with the vindication of such rights.

That there is at least a prima facie case on petitioner's behalf, that there has been a systematic exclusion of negroes from the jury can hardly be denied by the State of Louisiana. In fact, the judges of the Criminal District Court for the Parish of Orleans seem to take "judicial notice" of this fact by making statements for the public press to the

effect that in only one instance *in history has a negro ever served on a Grand Jury*, and that was because of a mistake, wherein a judge picked a light-skinned negro to serve on a Grand Jury under the mistaken belief that he was white. *See Appendix A & B.*

It is obvious that petitioner, as a result of "strained interpretation and "judicial legislation" by the Courts of Louisiana, has been placed in a situation, condemned by this Court in *Hernandez* v. *Texas*, 347, U.S. 667; 74 S. Ct. 667, 98 L. Ed. 866; *Carter* v. *Texas*, 177 U.S. 442, 20 S. Ct. 687, 44 L. Ed. 839; *Patton* v. *Mississippi*, 332 U.S. 463; 68 S. Ct. 184, 92 L. Ed. 76.

The result of the decision of the Courts of Louisiana is to deny petitioner's right even to make the objection in Louisiana, and petitioner's plea in this Court falls within the scope of the ruling of Chief Justice Holmes in *Rogers* v. *Alabama*:

> It is a necessary and well settled rule that the exercise of jurisdiction by this Court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights. *Rogers* v. *Alabama*, 192 U.S. 226, 24 S. Ct. 257, 74 L. Ed. 870.
>
> Whatever springs the State may set for those who are endeavoring to assert rights the State confers, the assertion of Federal rights, when plainly and reasonably made is not to be defeated under the name of local practice. *Davis* v. *Wechsler* 263, U.S. 22, 44 S. Ct. 13, 68 L. Ed. 143.
>
> It is therefore within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of a decision that were without any fair or substantial support. * * * Of course, if non-Federal grounds, plainly untena-

ble, may be then put forward successfully, our power to review may easily be avoided. *Ward v. Love County*, 253 U.S. 17, 64 L. Ed. 753.

Your petitioner, therefore, submits that this Court should assume jurisdiction as the purported non-Federal grounds upon which his case was decided by the Supreme Court of Louisiana are plainly untenable and without any fair and reasonable support, and that the law of Louisiana in *Article 202 of the Code of Criminal Procedure* as interpreted by the S. Ct. of Louisiana and specifically applied to his case should be struck down as it amounts to a *local practice* denying to him the assertion of a Federal right.

IV

In the event that this Honorable Court should see fit to grant relief to the co-defendant herein, Clifton Alton Poret, and remand his (Poret's) case so as to permit him to challenge the validity of the array, the venire and the Grand Jury for reasons asserted by said co-defendant but not asserted herein, then this Court should also remand your petitioner's case so that the indictment against him may be dismissed if his co-defendant's challenge to the legality and validity of the array, the venire and the Grand Jury is upheld.

It is to be noted that the Motions to Quash and the Bills of Exception reserved herein were Motions to set aside the array, the venire and the Grand Jury on the ground of systematic exclusion of negroes therefrom. The Louisiana law on this subject was clearly stated by the Supreme Court of Louisiana almost eighty years ago and has remained unchanged to date:

> While a motion to quash a particular indictment was limited in effect to the defendant invoking it, *a motion*

to set aside the venire, if sustained, had the effect of declaring the venire bad and illegally drawn and the jurors composing it no longer jurors, and no indictment or conviction by them would stand. State v. *Revells*, 31 La. Ann. 387 (1879). *State* v. *Smith*, 31 La. Ann. 406 (1879). (Italics by the writer of this brief).

The law of Louisiana also gives to your petitioner the right to claim the benefit of any bills of exception filed on behalf of his co-defendant during the entire proceedings:

> Codefendants, presumption as to reservation of bill of exceptions
>
> Whenever a bill of exceptions has been reserved in any criminal proceeding in which more than one defendant is on trial, it shall be presumed, unless the contrary clearly appears, that the bill has been reserved by all the defendants on trial. *Article 501, Louisiana Code of Criminal Procedure, Louisiana Statutes Annotated, R. S. 15:501.*

Without even the citation of the above authorities, it would be a manifest miscarriage of justice to remand the case of one co-defendant to permit him to assert a denial of the Federal Right of equal protection of the laws, which assertion if proved and upheld, would dismiss an indictment against him while at the same time sending the other co-defendant to his death by electrocution, when the latter co-defendant was indicted by the same Grand Jury, which is the subject of attack.

Conclusion

For the foregoing reasons, the judgment of the Supreme Court of Louisiana should be reversed and the cause remanded so as to give petitioner the right to show that he

was denied due process of law and the equal protection of the laws as guaranteed him by the Fourteenth Amendment to the Constitution of the United States, by the State of Louisiana through its administrative officials, its laws, and its courts, in systematically excluding negroes, members of his race, from the array, the venire and the Grand Jury which indicted him.

Respectfully submitted,

FELICIEN Y. LOZES,
RUDOLPH F. BECKER, JR.,
Attorneys for Petitioner.

Certificate of Service

Rudolph F. Becker, Attorney and a member of the Bar of this Court hereby certifies that a copy of the above Brief has been served on Leon D. Hubert, Esq., District Attorney for the Parish of Orleans, and upon Fred S. LeBlanc, Attorney-General for the State of Louisiana by United States Mail by depositing same in the United States Mailbox with first-class postage pre-paid, addressed to said counsel at their respective postoffice addresses.

FELICIEN Y. LOZES,
RUDOLPH F. BECKER, JR.,
Attorneys for Petitioner.

APPENDIX A

(The Times-Picayune, Thursday, February 3, 1955)

Negro May Act as Grand Juror

Judge O'Hara Notes US Supreme Court Ruling

A Negro may be named to the Orleans parish grand jury next September if the venire lists a legally qualified person of that race.

Criminal district court Judge William J. O'Hara, in a statement released Wednesday, noted that the United States Supreme Court has ruled that the exclusion of a race is unlawful.

Judge O'Hara said he will have nothing to do with the selection of the next grand jury but will select the jury taking office in September.

The next grand jury is to be named in March by Judge Niels F. Hertz.

Judge O'Hara referred to numerous attacks on the selection of grand juries and noted that decisions of the Supreme Court declare that regardless of what the grand jury selection system may be, if the facts reveal that a substantial portion of the population is Negro and no Negro has ever been selected, a prima facie case of systematic exclusion is made out.

Only one Negro has ever served on a grand jury here and he was mistaken for a white man when named to the jury, Judge O'Hara said.

Text of Judge's Statement

The text of Judge O'Hara's statement follows:

"Colored persons indicted for capital crimes in Orleans consistently make the plea that the grand jury is illegally

constituted because *no Negro has ever been selected to serve as a grand juror in Orleans parish except for one well known instance wherein a colored person who appeared to be a white person was elected as a grand juror.*

"The plea of these defendants is based upon decisions of the Supreme Court of the United States which declare that regardless what the grand jury selection system may be, if the facts are that a substantial portion of the population is colored and that no colored person has ever been selected as a grand juror for a period of time, a prima facie case of systematic exclusion of colored persons from the grand jury is made out.

Last Jury Attacked

"The last grand jury I selected was attacked because it was, like preceding grand juries, an all-white grand jury. I defended that grand jury on the ground that no colored person had ever before been selected on a grand jury, and the impending police investigation by the grand jury, and prevailing public tension was not a propitious time to place the first colored person on the grand jury.

"I have nothing to do with the selection of the next grand jury. I will select the grand jury after the next grand jury. If there are colored persons then on the venire, legally qualified for grand jury service, I will select a colored grand juror."

APPENDIX B

(New Orleans Item, Wed., Feb. 2, 1955)

First Negro Due On N. O. Grand Jury

The first Negro to serve on an Orleans Parish Grand Jury may be selected for the September term.

The Item learned today that Criminal Judge O'Hara has told lawyers he will select a Negro on the jury.

If Judge O'Hara follows through, his action may halt a barrage of appeals to the U. S. Supreme Court similar to those in three cases here in which the state is seeking the death penalty.

* * * * * * *

The U. S. Supreme Court has ruled several times that where there is a large Negro population in a community and no Negro has ever served on a grand jury, there is a violation of the 14th amendment.

But no case emanating from Orleans Parish has ever been ruled on by the U. S. Supreme Court—*and only one Negro has ever served on a grand jury here. He was appointed because the judge thought he was a white man.*

The three cases being appealed because of failure to appoint a Negro to the grand jury are:

The Robert Lea murder case.

The John Michel rape case.

The Fred Eubank murder case.

* * * * * * *

Twenty-two-year-old Robert Lea was convicted and sentenced to death for the murder of Tulane student Thomas McKenna during a French Quarter barroom hold-up.

His attorneys, both appointed by the Legal Aid Bureau and serving without pay, are John Dowling and Louis Trent.

The attorneys say they will appeal the conviction on the fact that negroes are systematically excluded from the grand jury.

Consequently, they say, the grand jury which indicted Lea was not representative of the community.

* * * * * * *

John Michel, a Negro, was convicted and sentenced to death for rape.

His case was appealed to the Louisiana Supreme Court by his court-appointed lawyers, George Fust and George Schreiber.

> The state supreme court ruled as it had previously, that if the objection to the grand jury is not raised within three days of the indictment, it is not valid.

Fust and Schreiber have asked the U. S. Supreme Court to review this state court decision.

* * * * * * *

Fred Eubank, 18-year-old Negro, is to be tried this month for the murder of an elderly woman during a robbery.

His court-appointed attorney, Herbert Garon, last month subpenaed all six ~~Orleans~~ Parish Criminal court judges.

He wanted them to testify at a hearing on a plea to quash the indictment.

> *Gist of the testimony was that none of the judges had ever selected a Negro to serve on the grand jury.*

Garon's plea to quash was overruled, but Garon has announced his intentions to appeal.

Several times in the past when this issue came up, former district attorneys would accept a lesser plea in capital cases when attorneys indicated they would attack the jury system.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 36

CLIFTON ALTON PORET,

Petitioner

v.

STATE OF LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR PETITIONER

RUDOLPH F. BECKER, JR.,
Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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No. 36

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF ON BEHALF OF PETITIONER, CLIFTON ALTON PORET

Opinions Below

The opinion of the Supreme Court of Louisiana, is reported in *State of Louisiana* v. *Edgar Labat and Clifton Alton Poret*, No. 41-718, 226 La. 201, 75 So. 2d. 333.

Jurisdiction

The Judgment of the Supreme Court of Louisiana was rendered on July 2, 1954. *State* v. *Poret, et al.*, 226 La. 201, 75 So. 2d. 333.

Rehearing was denied October 5, 1954.

The petition for Writ of Certiorari was filed in United States Supreme Court December 31, 1954.

The petition was granted on February 28, 1955. 348 U.S. 950; 75 S. Ct. 444; 99 L. Ed. 307. No. 396 Misc. October Term 1954.

The Jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. Sec. 1257 (3).

Statute and Constitutional Provisions Involved

Article 202 of the Louisiana Code of Criminal Procedure —Louisiana Revised Statutes Annotated, R.S. 15:202.

Time for urging objections to array; waiver

> All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, *heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn*, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard.

Constitution of the United States

Amendment XIV

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.*

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

Questions Presented

Whether this Honorable Court should assume jurisdiction in this case, because there was no independent and adequate State ground supporting the conclusion reached by the State of Louisiana in denying petitioner, *his right to challenge the Grand Jury on the ground of Systematic exclusion of negroes therefrom, because of their race and color.*

Statement of the Case

On December 11, 1950, the Grand Jury for the Parish of Orleans, State of Louisiana, returned an indictment against petitioner, Clifford Alton Poret, a colored male, and against one Edgar Labat, also a colored male, charging them with the crime of aggravated Rape, denounced by Louisiana Revised Statutes R. S. 14:42.

The Victim of the alleged rape was one Helen Rajek, a white female, and it was allegedly committed on November 12, 1950.

The petitioner Clifton Alton Poret, was not arrested nor was he informed as to the Indictment against him, until Oc-

tober 1952, which was about one year and seven months after the Grand Jury that indicted him went out of office.

The term of the Grand Jury, that indicted Clifton Alton Poret, petitioner, began on September 5, 1950 and ended March 5, 1951.

In October of 1952 petitioner Clifton Alton Poret, was brought to Louisiana, from a penitentiary in the State of Tennessee, and arrived in New Orleans, Louisiana, on October 3, 1952 where he was held in the Parish Prison, until October 27, 1952 at which time he was brought into court to be arraigned on the Indictment returned against him December 11, 1950.

On October 27, 1952 Clifton Alton Poret, went to court, attended by counsel, retained the day before, and a continuance of the arraignment was obtained from the court, to enable counsel for Clifton Alton Poret, *to file any pleadings that he desired to file.*

On November 7, 1952, the defendant, Clifton Alton Poret, through his counsel, filed his motion to quash the Indictment; the Grand Jury Venire, the Grand Jury Panel and the Grand Jury that returned the Indictment against him, because of the systematic unlawful and unconstitutional exclusion of negroes from said units.

That upon the filing of said Motion to Quash, the matter was continued by the court until November 17, 1952.

On November 17, 1952 the State of Louisiana, through the District Attorney, filed a Demurrer to the Motion to Quash, on the Grounds that the Motion to Quash was filed too late, under Louisiana Revised Statutes, R. S. 15:202.

Thereafter arguments were heard by the Court on the State's Demurrer, and on January 7, 1953 rendered a Judgment sustaining the State's Demurrer, and denying to Petitioner Clifton Alton Poret, his constitutional right, to be

heard and to introduce evidence in support of his motion to Quash.

Argument

The State's Demurrer is based upon Louisiana Revised Statutes, R.S. 15:202 and the case of *State of Louisiana* v. *Anthony Wilson*, 14 So. 2d. 873.

This Statute is the same as Article 202 of the Louisiana Code of Criminal Procedure, which is the same as Act 44 of 1877 limiting the time for filing a Motion to Quash, etc., *to the first day of the Jury term, while* R.S. 15:202 limits the filing of a Motion to Quash, before *the expiration of the third judicial day of the Jury term.*

Until the *Wilson* case, the Louisiana Courts, in construing Act 44 of 1877 and Article 202 of the Louisiana Code of Criminal Procedure, held that, the "third Judicial Day" rule does not apply when the crime was committed or the indictment was found after said date.

State v. *Strickland*, 41 La. ann. 514
State v. *Vegas*, 19 La. ann. 105
State v. *Texada*, 19 La. 436
State v. *Vance*, 31 La. ann. 398
State v. *Clevery*, 43 La. ann. 1133

In the *Wilson* case and the case at Bar, the crime is alleged to have taken place, long after the first three days of the Grand Jury term, therefore to sustain the State's position, and to keep the defendant from having the Indictment Quashed, the courts had to place a *strained* interpretation, on R. S. 15:202.

Since that decision there has existed nothing but confusion.

Professor Dale E. Bennett of the Louisiana State University, an authority on Criminal Procedure in Louisiana,

sets forth the difficult legal situation in a recent article from which we quote:

> Another source of considerable difficulty and dissatisfaction has been the requirement of Article 202 that objections to the general venire or jury lists must be urged "before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering trial of the case if it be begun sooner; otherwise all such objections shall be considered as waived and shall not afterwards be urged or heard". This article is apparently aimed at securing prompt objections to jury venires and jury lists, but it presents a cure which is distinctly worse than the situation which it purports to remedy. Insofar as it relates to objections to the Grand Jury Panel there is apparent conflict with other articles which permit the filing of objections to the indictment at any time prior to the commencement of the trial. As applied to the time for objecting to petit jury venires, it states a rule which also frequently proves unworkable.
>
> * * * * * * *
>
> The method of challenging the validity of an indictment or information, that is, by demurrer or motion to quash, is clearly spelled out in the Code of Criminal Procedure. However, the time for filing such preliminary pleas is confusingly stated in the various codal provisions. Article 284 states that such objections must be taken "before the arraignment". Article 287 declares that the demurrer and motion to quash "must be filed, tried and disposed of before trial on the merits." Even more latitude is apparently contemplated by the declaration in Article 253 that objections

to the indictment must "be made prior to the commencement of the trial or at such time thereafter as the court in its discretion permits". In cases where the indictment is defective by reason of the illegal composition of the grand jury list, added confusion is injected by Article 202. Ignoring the possible complications of Article 202, certain fairly definite conclusions emerge from a careful analysis of the above provisions. The defendant's unqualified right to file a demurrer or motion to quash the indictment is controlled by Article 284 which directs the filing of such motions before pleading to the merits at the arraignment. After the accused has entered a plea to the merits he may, in the discretion of the trial judge, withdraw that plea to plead otherwise. In such cases Article 287 will generally control and the substituted motion to quash must be tried and disposed of before the trial on the Merits. While Article 253 authorizes the Judge to permit the filing of the motion to quash after the trial is under way, such discretionary permission will seldom be granted since the resulting mistrials are not favored.

To the veteran criminal lawyer or trial judge, the above pattern is fairly well set. However, the inexperienced lawyer or judge is faced with a rather perplexing situation—as evidenced by the fact that cases involving this matter are presented at almost every term of the Supreme Court. A great deal of confusion could be avoided by a very simple statement as to the latest point at which objections to the indictment may be filed as of right, and the latest point at which they may be permitted within the sound discretion of the trial judge. Possibly a rephrasing and combination of Articles 284 and 287 would effect such clarification. At any rate,

Article 202 should be eased out of the picture in this regard.

Louisiana Criminal Procedure—a critical appraisal, XIV Louisiana Law Review—17—20—21, December, 1953.

It is to be noted that the above pattern, which the Professor states would be "well set to the veteran criminal lawyer or trial judge," ignored "the possible complication of *Article 202.*" Yet your petitioner was denied his right to challenge the array, the venire of the grand jury that tried him on the ground of systematic exclusion of negroes for the reason that according to the trial judge and the Supreme Court of Louisiana, his motion to quash was filed "too late", according to the provisions of *Article 202.*

In view of the above, it is submitted that your petitioner could not have waived his right to challenge the Grand Jury and the Venire and the Panel, when he was not in the Jurisdiction of the Court, nor did he have the assistance of Counsel to advise him of his right to timely challenge said Grand Jury, the Venire and the Panel.

II

This Court should assume jurisdiction in this case because there was no independent and adequate state ground supporting the conclusion reached by the State of Louisiana in denying petitioner his right to challenge the array, the venire and the grand jury on the ground of systematic exclusion of negroes therefrom.

As was stated by the minority of the Court in the recent case of *Williams v. Georgia,* U. S. , 75 S. Ct. 814, 828, L. Ed. (1955), a purported state ground is not independent and adequate in two instances. First where the circumstances give rise to an inference that the state court

is guilty of an evasion—an interpretation of state law with the specific intent to deprive a litigant of a federal right. Second, where the state law, honestly applied though it may be, and even dictated by the precedents, throws such obstacles in the way of enforcement of federal rights that it must be struck down as unreasonably interfering with the vindication of such rights.

It is submitted that both of the above tests are applicable in petitioner's case. The record indicates that petitioner's motion to quash the indictment was held by the trial court and the Supreme Court of Louisiana to have been filed "too late", according to the provisions of *Article 202 of the Louisiana Code of Criminal Procedure*. Petitioner then urged by way of a motion in writing that said Article was patently unconstitutional. Said Article provides as follows:

> All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard or urged before the expiration of the *third judicial day of the term for which said jury shall have been drawn*, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard.
>
> *Louisiana Statutes Annotated, R. S. 15:202.*

If the Article be interpreted *as passed by the legislature*, "the third judicial day of the term for which said jury shall have been drawn", had expired long before the alleged crime was committed. The Grand Jury which indicted your petitioner was impaneled on September 5, 1950 and, therefore, under the *Article as written*, your petitioner had until *September 8, 1950* in which to file the objection to the array or venire.

This he obviously could not do as the alleged crime was not committed until more than two months later on *November 12, 1950*, and defendant was not indicted until *December 11, 1950*, more than three months after the date for objecting to the array or venire had elapsed, *according to the Article as written*.

However, the Louisiana Supreme Court in the case of *State v. Wilson*, 204 La. 24, 14 So. 2d 873, interpreted the above plain language to mean the *third day after* the end of the term of the Grand Jury.

This interpretation by the Supreme Court gave rise to the following comment in the *Tulane Law Review* branding it as an interpretation which can be used as a "means of sidetracking the issue of race discrimination in selecting juries".

We quote:

> "Today when grand jury terms and court terms do not coincide, the language of Article 202 falls far short of making clear the legislative intent with regard to this important limit on a defendant's rights. As long as the articles of the Code are so phrased as to give rise to such conflicting interpretations, a defendant with *bona fide* grounds for objection, unable to determine which article is applicable to his case or just what limit the applicable article imposes, may unwittingly allow the time for urging his objection to lapse by relying on the wrong Code article or giving it a different interpretation from that of the Supreme Court. *In its present, ambiguous form, this Article is one source of confusing technicalities of procedure in criminal cases which can be used as a means of sidetracking the issue of race discrimination in the selecting of juries.* To protect the rights of an accused person in Louisiana, it is suggested that the legislature clarify *Article 202*,

making plain its scope and the extent of the time limitation it imposes. The general explanation in the present Article of the type of objection covered is inadequate, particularly if the interpretation of prior statutes on the same subject cannot be relied on. Just what objections must be urged within the strict time limit of *Article 202* rather than the more extended period allowed by subsequent articles on quashing indictments generally should be made clear. The apparent conflict among the subsequent articles with regard to the time during which indictments may be quashed on grounds other than those included in *Article 202* might well be resolved by the legislature." *18 Tulane Law Review 462 (481), 1944.*

The "reductio and absurdum" of the strained interpretation of *Article 202* was finally reached in the most recent Louisiana case of *State v. Chianelli*, 226, La. 552, 76 So. 2d 727, (1955), by the *Louisiana Supreme Court.*

We quote from this opinion:

> We concede that this Court's interpretation of Article 202 in the Wilson case may have been somewhat strained. We concede likewise that it might be considered by some to be judicial legislation rather than judicial interpretation. Nevertheless, this Court's construction and interpretation of Article 202 in the Wilson case has been approved by this Court in two recent cases, *State* v. *Michel*, 225 La. 1040, 74 So. 2d. 207 and *State* v. *Labat, et al*, 226 La. 201, 75 So. 2d 333. * * *
>
> Article 202 of the Code of Criminal Procedure requires legislative not judicial action; but the Legislature in amending this Article should be careful not to incorporate in it any provision that would subject the

statute to an attack on the ground of a denial of due process of law.

It is to be noted that the Louisiana Supreme Court quotes your petitioner's own case as authority for the interpretation of *Article 202*, which the Court itself concedes "somewhat strained" and which amounts to "judicial legislation rather than judicial interpretation".

The position above taken by petitioner is supported by an excellent comment in the Louisiana Law Review of June, 1955.

> *The present interpretation of Article 202*, as established by the Wilson case and applied to objections to petit jury venires in the Chiânelli case, *is subject to critism*. This construction in regard to objections to grand jury venires, *fails to provide for cases in which an accused is not assisted by counsel until on or after the third judicial day after the expiration of the grand jury term.*
>
> . . . . . .
>
> The basic problem of statutory construction is one of ascertaining the intent of the legislature. In relation to Article 202, the generally applicable canons of statutory construction would lead to a different conclusion from that announced in the Wilson case. Thus, under the "plain meaning" rule or "rule of literalness", it is difficult to say how the phrase "of the term" could be construed as meaning "after the term." However, since a literal interpretation would lead to the incongruous result of depriving many accused persons of the right of objecting to jury venires, the plain meaning of the language of the statute should not be relied upon as conclusively proving the legislative intent.
>
> . . . . . .

However, it is submitted that the court in the Wilson case *was guilty of judicial legislation.* Also, since this Supreme Court can at any time decide that the rule of the Wilson case is illogical and revert to the prior rule, an accused person is at the present somewhat insecure in waiting until after the first three judicial days of the term to raise objections to the jury venire. Possibly the only solution lies in the amendment of Article 202 by the legislature. *TIME FOR URGING OBJECTIONS TO JURY LISTS AND VENIRES: ARTICLE 202, LOUISIANA CODE OF CRIMINAL PROCEDURE. XV Louisiana Law Review 749, 751, 754. (Italics by writer of brief.)*

A complete statement of the historical background of *Article 202* is presented by the late Chief Justice O'Neill of the Louisiana Supreme Court in a lengthy dissenting opinion of the case of *State* v. *Anthony Wilson* 204, La. 24, 14 So. 2d. 873, 885 (1943). Justice O'Neill concludes his opinion with the statement that the construction of *Article 202* by the majority of the Court and by the trial judge in that case "is not only contrary to the wording of the Statute—and contrary to the jurisprudence on the subject but is, in fact, an impossible construction."

It is this same "impossible construction" that was relied on by the trial judge and the Supreme Court of Louisiana in your petitioner's case. See *State* v. *Labat*, 226, La. 201, 75 2d. 333 (337).

We quote briefly from the Chief Justice's dissenting opinion:

> The limitation as expressed in the article (Article 202) is not applicable to this case; *but the trial judge has made the limitation applicable to this case by giving the limitation a meaning which its wording does not express, and thus, has denied the defendants*

the right even to make the objection that he was denied the equal protection of the laws. State v. Wilson, Supra at 14 So. 2d. 889. (Italics by writer of this brief).

It is, therefore, submitted that there was no independent and adequate state ground supporting the conclusion reached by the State of Louisiana in denying petitioner the right to challenge the array, the venire and the grand jury on the ground that he was denied the equal protection of the laws. The circumstances surrounding this case certainly give rise to an inference that the law of the State of Louisiana, namely *Article 202 of the Code of Criminal Procedure* was interpreted with the specific intent to deprive your petitioner of a Federal right. Even assuming that the State Court is not guilty of an evasion and that the law of Louisiana was honestly applied, and even dictated by precedents, it is clear that the State law as interpreted by the Supreme Court in your petitioner's case throws such obstacles in the way of enforcement of his Federal rights that it must be struck down as unreasonably interfering with the vindication of such rights.

That there is at least a prima facie case on petitioner's behalf, that there has been a systematic exclusion of negroes from the jury can hardly be denied by the State of Louisiana. In fact, the judges of the Criminal District Court for the Parish of Orleans seem to take "judicial notice" of this fact by making statements for the public press to the effect that in only one instance *in history has a negro ever served on a Grand Jury*, and that was because of a mistake, wherein a judge picked a light-skinned negro to serve on a Grand Jury under the mistaken belief that he was white.

It is obvious that petitioner, as a result of "strained interpretation" and "judicial legislation" by the Courts of Louisiana, has been placed in a situation, condemned by

this Court in *Hernandez* v. *Texas*, 347, U.S. 667; 74 S. Ct. 667; *Carter* v. *Texas* 177 U.S. 442, 20 S. Ct. 687, 44 L. Ed. 839; *Patton* v. *Mississippi* 332, U.S. 463, 68 S. Ct. 184.

The result of the decision of the Courts of Louisiana is to deny petitioner's right even to make the objection in Louisiana, and petitioner's plea in this Court falls within the scope of the ruling of Chief Justice Holmes in *Rogers* v. *Alabama:*

> It is a necessary and well settled rule that the exercise of jurisdiction by this Court to protect constitutional rights can not be declined when it is plain that the fair result of a decision is to deny the rights. *Rogers* v. *Alabama* 192 U.S. 226, 24 S. Ct. 257, 74 L. Ed. 870.
>
> Whatever springs the State may set for those who are endeavoring to assert rights the State confers, the assertion of Federal rights, when plainly and reasonably made is not to be defeated under the name of local practice. *Davis* v. *Wechsler* 263, U.S. 22, 44 S. Ct. 13, 68 L. Ed. 143.
>
> It therefore is within our province to inquire not only whether the right was denied in substance and effect, as by putting forward non-Federal grounds of a decision that were without any fair or substantial support. * * * Of course, if non-Federal grounds, plainly untenable, may be then put forward successfully, our power to review may easily be avoided. *Ward* v. *Love County*, 253 U.S. 17, 64 L. Ed. 753.

Your petitioner, therefore, submits that this Court should assume jurisdiction as the purported non-Federal grounds upon which his case was decided by the Supreme Court of Louisiana are plainly untenable and without any fair and reasonable support, and that the law of Louisiana in *Article*

202 of the Code of Criminal Procedure as interpreted by the S. Ct. of Louisiana and specifically applied to his case should be struck down as it amounts to a *local practice* denying to him the assertion of a Federal right.

Summary of Argument

I. Petitioner was denied Due Process of Law and the Equal Protection of the Law, by the State of Louisiana, in that your petitioner was not within the Jurisdiction of the Louisiana Courts during the entire time that the prescriptive period under R.S. 15:202 was running. That almost two years had passed before he was returned to Louisiana to face the charge against him.

That before his arraignment he filed his Motion to Quash the Indictment, which under the Louisiana Statutes, (Article 202 of the Code of Criminal Procedure excepted) was the proper time to file same.

The Louisiana Courts then held that petitioners right to challenge the Grand Jury that indicted him on the Grounds of systematic exclusion of negroes, because of their Race and color, had prescribed during this period of time.

II. There was no independent and adequate state ground supporting the conclusion reached by the trial judge and the Supreme Court of Louisiana in denying petitioner the right to challenge the Grand Jury on the ground of systematic exclusion of negroes. The Supreme Court of Louisiana has in subsequent cases admitted that its construction of the Articles of the Louisiana Code of Criminal Procedure, under which petitioner's rights were denied, was a "strained construction" and amounted to "judicial legislation".

Conclusion

For the foregoing reasons, the judgment of the Supreme Court of Louisiana should be reversed and the cause remanded so as to give petitioner the right to show that he

was denied due process of law and the equal protection of the laws as guaranteed him by the Fourteenth Amendment to the Constitution of the United States, by the State of Louisiana through its administrative officials, its laws, and its courts, in systematically excluding negroes, members of his race, from the array, the venire and the Grand Jury which indicted him.

Respectfully submitted.

RUDOLPH F. BECKER, JR.
Attorney for Petitioner.

Certificate

I hereby certify that a copy of this Brief has this day been served upon Honorable Fred LeBlanc, Attorney General of the State of Louisiana, and upon Honorable Leon D. Hubert, District Attorney for the Parish of Orleans, State of Louisiana.

New Orleans, Louisiana
August 22, 1955

RUDOLPH F. BECKER, JR.
Attorney for Petitioner.

(3802-6)

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No. 36

In the Supreme Court of the United States

OCTOBER TERM, 1955

CLIFTON ALTON PORET AND EDGAR LABAT,
PETITIONERS

v.

STATE OF LOUISIANA

On Writ of Certiorari to the Supreme Court of the State of Louisiana.

Brief on Behalf of the State of Louisiana.

FRED S. LeBLANC,
Attorney General.
MICHAEL E. CULLIGAN,
Assistant Attorney General.
LEON D. HUBERT, JR.,
District Attorney.
ADRIAN G. DUPLANTIER,
First Asst. District Attorney.

Criminal Courts Building
New Orleans, Louisiana

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OCTOBER TERM, 1955

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On Writ of Certiorari to the Supreme Court of the State of Louisiana.

Brief on Behalf of the State of Louisiana.

STATEMENT OF ISSUES

May it please the Court:

The facts of this case are succinctly stated by the Supreme Court of Louisiana in the opinion which is reproduced at pages 24-34 of the record. As the opinion well illustrates, the State's case against petitioner on its merits was very strong.

In fact, the State produced the direct testimony of two eye-witnesses to the crime who positively and definitely identified both defendants, plus strong corroborative evidence. This is, thus, not a situation where constitutional rights were violated to strengthen a weak case.

On December 11, 1950, petitioners, both Negroes, were indicted for aggravated rape by the Grand Jury for the Parish of Orleans, which was empaneled to serve from September 5, 1950 to March 5, 1951. (R. 1, 12).

On January 5, 1951, two months before the grand jury term ended, the Court appointed E. I. Mahoney, Esq., as counsel to represent petitioner Labat. (R. 1). On January 29, 1952, Mr. Mahoney withdrew as counsel for Labat, who was then represented by his own attorney. (R. 1, 36).

On November 7, 1952, one year and eight months after the grand jury term ended, Labat filed a motion to quash the indictment on the ground that he was deprived of due process and of equal protection of the laws because there had been systematic exclusion of Negroes from the Grand Jury which indicted him. (R. 3).

Petitioner Poret fled almost immediately after the commission of the rape. Diligent and sustained efforts on the part of the New Orleans Police Department and the office of the Criminal Sheriff to arrest Poret were fruitless. (R. 24, 28, 37-40, 45).

More than seven months after the expiration of the term of the Grand Jury which indicted him, it was learned that Poret was confined in the Tennessee State Penitentiary. (R. 38-40). Every effort was made to have Poret returned to Louisiana for trial. (R. 40-44). In October, 1952, he was returned to Louisiana upon his release by Tennessee. (R. 38, 40).

On October 27, 1952, petitioner Poret, represented by counsel, was arraigned. (R. 2). On November 7, 1952, he filed a motion to quash the indictment on the same ground urged by Labat. (R. 3).

The State filed an answer and demurrer to the motion to quash filed by both defendants on the ground that they had not been filed within the time limit established for filing such pleas by Louisiana law. (R. 10, 12, 22). The trial court sustained the demurrer as to both defendants (R. 5), and this ruling was affirmed by the Supreme Court of Louisiana. (R. 26-29).

It is important to note at this point that the only matter at issue and passed upon by the Louisiana Courts was whether petitioners' motions to quash were filed timely. The Louisiana courts did not and could not as the issues were presented, pass upon the question of whether there had been in fact systematic exclusion of Negroes from the grand jury. That question was never before the

Louisiana Courts, and it is not now before this Court.

Thus, the only issue before this Court is whether the Louisiana procedural statute which requires a motion to quash an indictment on the ground of the illegality of a grand jury to be filed within a definite time limitation violates any federal constitutional rights of petitioners.

ARGUMENT

I.

The Louisiana law which provides a time limitation for filing objections to the manner of selecting a grand jury does not violate any federal constitutional provision. La. Rev. Stat. 15:202 and the Wilson case.

In 1928 Louisiana adopted a comprehensive Code of Criminal Procedure. This Code was reenacted verbatim by the Legislature of Louisiana in 1950 in a general revision of the Louisiana statutes. The 1928 Code became Title 15 of the Louisiana Revised Statutes of 1950. Article 202 of this Code (or R.S. 15:202) provides as follows:

> "§ 202. TIME FOR URGING OBJECTIONS TO ARRAY: WAIVER
>
> All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against

> any array or venire must be filed, pleaded, heard or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard."

It should be noted that while this section does not specifically refer to grand juries, it is contained in a Part of the Code entitled "Grand and Petit Juries". It is thus clear that Article 202 by inclusion in a Part so entitled, deals with both grand and petit juries. As will be seen hereafter, this has always been the interpretation placed upon it by the courts of Louisiana.

In 1943, the Supreme Court of Louisiana, in a case identical in every respect with the instant case, interpreted Article 202 to mean that an accused could file attacks upon the grand jury only until the third judicial day after the *end* of the grand jury term. *State v. Wilson*, 204 La. 24, 14 S. (2d) 873 (1943).

In the instant case, the motions to quash were not filed until November 7, 1952, a year and eight months after the end of the grand jury term. Thus it is clear that petitioners filed their pleadings too late, and the Supreme Court of Louisiana so held, affirming the *Wilson* case.

Before discussing the constitutional validity of

the *Wilson* doctrine, which was affirmed and applied in the instant case by the Louisiana courts, it is well to note a few matters about the *Wilson* case.

1. The Supreme Court of Louisiana in the *Wilson* case clearly recognized that Article 202 as applicable to grand juries should be interpreted to allow an accused three days after the *end* of the grand jury term, because if the time limitation should be interpreted to mean three days after the *beginning* of the six months term of the grand jury no opportunity to make an attack upon the grand jury would be afforded those persons who were indicted after these three days had elapsed. Thus the Supreme Court of Louisiana recognized the principle that a defendant is entitled to a reasonable time within which to raise federal constitutional questions, and interpreted Article 202 so as to provide such a period.

2. The Supreme Court of the United States granted an appeal in the *Wilson* case, but *thereafter dismissed the appeal in a per curiam reading as follows:*

> "The motion to dismiss is granted and the appeal is dismissed, it appearing that the decision is based upon a non-federal ground adequate to support it." See *Wilson v. Louisiana*, 320 U.S. 714, 64 S.Ct. 257, 88 L.Ed. 419 (1943).

Thus, this Court has already passed upon the

precise issue involved in this case, and has approved the *Wilson* doctrine. Acting under the *Wilson* decision as approved by this Court, the Louisiana Supreme Court held that the motions to quash in the instant case was filed too late. Under the rule announced by the United States Supreme Court in the *Wilson* case, the decision of the Louisiana Supreme Court in the instant case should be affirmed, being "based upon a non-federal ground adequate to support it". The United States Supreme Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with state law. *Edelman v. California*, 344 U.S. 357, 73 Sup. Ct. 293, 97 L.Ed. 387 (1953).

II.

Federal Courts, as a general rule, must accept the interpretation placed upon state statutes by state courts.

It is a well-established principle that federal courts must accept the meaning and interpretation placed on a state statute by state courts. The United States Supreme Court has always insisted that state courts be permitted to decide questions of state law, and has even had federal courts decline jurisdiction to awaiting a ruling from a state court. Cf. *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 Sup. Ct. 1098, 87 L.Ed. 1424 (1943); *Williams*

v. Kaiser, 323 U.S. 471; 65 Sup. Ct. 363, 89 L.Ed. 398 (1945).

This doctrine does not prevent the Supreme Court of the United States from determining whether the statute *as so interpreted*, violates a federal constitutional privilege. But it does mean that the Supreme Court of the United States will not undertake to place an interpretation upon a state statute different from that given it by the state courts, even though it might not agree with the interpretation. It has been recognized that the only instance in which this general rule will not be applied is where the circumstances give rise to an inference that the state court is guilty of an "evasion"—an interpretation of state law with the specific intent to deprive a litigant of a federal rights. See *Williams v. Georgia*, 349 U.S. 375 at 399, 75 Sup. Ct. 814, 99 L.Ed. advance p. 703 (1955).

III.

The Wilson doctrine is not an "evasion" to deprive petitioner of a federal right.

Petitioners argue that the *Wilson* doctrine is a prohibited "evasion" within the intendment of the rule stated above. This is based on the theory that Article 202 does not mean what the Supreme Court of Louisiana says it means. It should be remembered that the *Wilson* doctrine was not developed for the instant case but has been the law of Loui-

siana since the *Wilson* decision was approved by this Court thirteen years ago. The Supreme Court of Louisiana adhered to its prior interpretation of Article 202 in this case and its companion case, *State v. Michel*, and also in a later case, *State v. Chianelli*, 226 La. 552, 76 S. (2d) 727 (1954).

It is significant also, as pointed out by the Louisiana Supreme Court in its opinion in *State v. Michel*, that the Louisiana Legislature has met many times since the *Wilson* doctrine was enunciated. Not only has the Legislature not changed the *Wilson* doctrine, but it has approved it by reenacting Article 202 of the Criminal Code without change in 1950 as Section 202 of Title 15 of the Louisiana Revised Statutes. See *State v. Michel*, 225 La. 1040, 74 So. (2d) 207 (1954).

It is clear from the reasoning of the opinion in the *Wilson* case that the Court was not attempting to "evade". In fact quite the contrary is evident. The Louisiana Supreme Court in the *Wilson* case interpreted Article 202 in the most liberal manner possible, permitting a defendant to attack the grand jury until three days after the *end* of the grand jury term instead of three days after the *beginning* thereof. The effect of the decision is to give a defendant more time, not less time, to raise federal questions. In fact, the meticulous concern of the Louisiana Supreme Court for the protection of federal rights is the central theme of the de-

cision. For example, the following language from the opinion in *Wilson* on rehearing is significant:

> ". . . Obviously, under the construction requiring the filing of the motion to quash within three judicial days after the Grand Jury is drawn, the defendant would not be afforded an opportunity, through proper pleadings, to challenge the legality of the drawing and selecting of the jury, the array or venire. Therefore, this Court, by giving Article 202 such construction would unquestionably make its provisions unconstitutional under our State and Federal Constitutions because of a denial of due process of law.
>
> "While the constitutionality of Article 202 of the Code of Criminal Procedure is not attacked in this case, it is clear that its provisions apply to all persons charged with crime regardless of color, race, or previous condition of servitude and, therefore, it does not conflict with the provisions of the articles of the State and Federal Constitutions guaranteeing persons the equal protection of the law. Neither does the construction which we have placed upon its provisions in the majority opinion deny to any person charged with violating a criminal law, the equal protection of the law because of race, color, or previous condition of servitude. The interpretation which we have placed upon the statute is in keeping with our previous holdings, in cases where persons of the white race were tried for

criminal offenses and failed to comply with the provisions of Article 202 of the Code of Criminal Procedure in attacking the legality of the drawing and selecting of the Grand Jury, that the plea came too late and would not be considered." *State v. Wilson*, 204 La. 24, at 75-76, 14 S. (2d) 873 (1943).

In *State v. Chianelli*, supra, decided after the instant case, this concern about federal rights was again expressed by the Supreme Court of Louisiana in these words:

> "We are conscious of the fact that under the interpretation given to Article 202 by the Wilson case and others following it an accused can indefinitely delay the trial of his case by waiting until the date fixed for trial to object to the petit jury array or venire. However, to avoid these unnecessary delays Article 202 of the Code of Criminal Procedure requires legislative, not judicial, action; but the Legislature in amending this article should be careful not to incorporate in it any provision that would subject the statute to an attack on the ground of denial of due process of law." *State v. Chianelli*, 226 La. 552, at 559-560, 76 S. (2d) 727 (1954).

Furthermore, an analysis of the cases on the subject of "evasion" reveals situations so strained as to amount practically to bad faith on the part of state courts. Thus in *Rogers v. Alabama*, 192 U.S. 266, 24 Sup. Ct. 257, 48 L.Ed. 417 (1904), de-

fendant's motion to quash the indictment on the ground of systematic exclusion of Negroes was stricken by the trial court. The Supreme Court of Alabama affirmed the trial court's action under a statute which provided that the court could strike from the record pleadings which were unnecessarily prolix. The United States Supreme Court reversed the conviction, pointing out that the entire motion setting up a constitutional right was only two pages in length. Manifestly, there is absolutely no similarity between the action of the Alabama Supreme Court in *Rogers* and that of the Louisiana Supreme Court in *Wilson* and in the instant case.

As a matter of fact, it is submitted that "evasion" can be found only in the *application* of a state statute to a particular situation, as in *Rogers*, not in the *interpretation* of a statute as in *Wilson*, since an interpretation necessarily affects all litigants alike and applies in all cases, whether or not they involve federal rights.

Certainly it would be more than unjust to brand the concern of the Louisiana Supreme Court for the protection of federal rights which is manifest in its opinions in *Wilson* and in the subsequent cases involving Article 202 as an "evasion". So obvious is it that the *Wilson* decision does not involve an "evasion" that this Court dismissed the appeal in that case with a per curiam opinion.

IV.

R.S. 15:202 as interpreted in the Wilson case is a valid procedural statute which does not unreasonably interfere with the assertion of federal rights.

It is clear that there must be some time in the course of a criminal proceeding after which it will be too late to raise certain pleas. Otherwise, a defendant could wait until he is convicted before raising his objection, and thus get two or more trials instead of one. As Mr. Justice Clark said in his dissent in *Williams v. Georgia*, 349 U.S. 375 at 403, 75 Sup. Ct. 814, 99 L.Ed. advance p. 703 (1955):

> "A State may be influenced by the unfairness of allowing the litigant who remains silent two chances for acquittal while giving the diligent litigant only one.
>
> And orderly administration of the laws often imposes hardship upon those who have not properly preserved their rights."

Louisiana has decided that the proper limitation upon the filing of a plea attacking a grand jury is three days after the expiration of the term of the grand jury. This gives everyone at least three days, and in most instances more than three days, to attack the grand jury. The motion to quash is itself a simple document, and certainly no great amount of research or study is required to raise

the issue of systematic exclusion. See, for example, the simplicity of the very documents filed in this case. (R.9 & 19). Thus, little or no preparation or study was required by petitioners' counsel.

What is Louisiana's purpose in establishing this time limitation? The *Wilson* case gives two answers to this question:

1. "This Court, in the case of State v. Strickland, supra, in interpreting the provisions of Section 11 of Act No. 44 of 1877, and, in *State v. White*, supra, in applying the provisions of Article 202 of the Code of Criminal Procedure, pointed out that the Legislature intended to require an accused to file his objections and pleas to any defect or irregularity in the drawing or the selecting of a juror or jury or venire or array within a certain period of time, in order to prevent the defendant from going to trial on the merits, and, in the event he were convicted, assure himself of another trial by withholding his pleas as to any error or irregularities in the drawing and selecting of the jury, venire and array. It is apparent that the Legislature took into consideration the fact that timeliness in filing such pleas was necessary to the effective and proper administration of justice by the State."

2. "Persons charged with offenses under indictments are usually not brought to trial for months and sometimes for years after

> the time when the members of the grand jury who returned them have gone out of office. The persons who composed the array from which the venires were drawn are very likely to be scattered over a wide area within a reasonable time after the grand jury term ends. If a defendant, under the law, were granted the right to raise this type of objection and file this character of pleading at any time before trial, it is easy to see that in innumerable instances the State would be put at serious disadvantage in making its proof and this would result in a great many guilty persons escaping justice. Apparently, our Legislature had this in mind because under Section 16 of Act No. 135 of 1898, the defendant was granted the right to file these types of objections and pleadings at any time before the beginning of the trial of the case. The members of the Legislature in 1928 changed that statute by placing into the Code of Criminal Procedure Article 202." *State v. Wilson*, 204 La. 24, at 47, 48, 14 S. (2d) 873 (1943).

Moreover, the state's requirement of an early raising of the plea gives the state a better opportunity to correct whatever errors might have been made.

Thus, it is submitted that the *Wilson* doctrine is not a sinister anti-federal doctrine. It is a reasonable, understandable, properly motivated doc-

trine, adopted for the purpose of fostering the orderly administration of justice. It is applicable not solely to Negroes, nor to motions to quash based upon federal rights. It applies to all persons and to all types of objections.

It is well settled that State procedural devices will be upheld by this Court if they provide a reasonable opportunity to raise federal questions. Thus, in *Parker v. Illinois*, 333 U.S. 571, 68 Sup. Ct. 708, 92 L. Ed. 886 (1948), this Court upheld an Illinois practice which established a waiver of federal questions where an appeal was taken to an intermediate appellate court rather than to the Illinois Supreme Court. The Court said:

> "When federal rights are involved, it is, of course, for this Court finally to determine whether the failure to follow the procedure designated by a State for their protection constitutes a waiver of them. *Davis v. O'Hara*, 266 U.S. 314; *Central Union Co. v. Edwardsville, supra.* The Court said in the *Edwardsville* case that when the waiver is founded on a failure to comply with the appellate practice of a State, the question turns on whether this practice gives litigants a reasonable opportunity to have the issue as to the claimed right heard and determined' by the state court. 269 U.S., pp. 194-195. (333 U.S. 571 at 574).

In *Bailey v. Commonwealth*, 193 Va. 814, 71 S. E. 2d 368 (1952), the Supreme Court of Virginia

affirmed the trial court's decision rejecting a motion attacking the grand jury on the ground of discrimination, holding that the attack was not timely. *This Court denied certiorari.* (344 U.S. 886, 73 Sup. Ct. 186, 97 L. Ed. 686, 1952).

Yakus v. United States, 321 U.S. 414, 64 Sup. Ct. 660, 88 L.Ed. 834 (1944), involved a federal statute somewhat similar to Article 202 of the Louisiana Code of Criminal Procedure. The Emergency Price Control Act of 1942 provided that the validity of a price regulation could not be attacked in a criminal proceeding for violation thereof unless a protest was filed with the Administrator within a sixty-day period. Defendant failed to file a protest timely and was convicted. In affirming the conviction the United States Supreme Court said:

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *O'Neil v. Vermont*, 144 U.S. 323, 331; *Barbour v. Georgia*, 249 U.S. 454, 460; *Whitney v. California*, 274 U.S. 357, 360, 362, 380. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. *Seaboard Air Line Ry. Co. v. Watson*, 287 U.S. 86. While this Court in

its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis, J. concurring in *Whitney v. California, supra*, 380, and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare *Woolsey v. Best*, 299 U.S.1 with *Ex parte Siebold*, 100 U.S. 371." (321 U.S. 414, 444-445).

The opinion in the *Yakus* case (Footnote 3, 321 U.S. at p. 435) cites a number of other federal cases in which limited periods for resort to administrative relief as a prerequisite to proceeding in court have been held to be sufficient. In *Bellingham Bay & B.C.R. Co. v. New Whatcom*, 172 U.S. 314, 19 Sup. Ct. 205, 43 L.Ed. 460 (1899), a ten day period for such action was held reasonable.

In view of the simplicity of the pleading required to urge the illegality of a grand jury, it cannot be seriously argued that a statute which always affords at least three days and often a much longer period is unreasonable. (Compare, *Avery v. Alabama*, 308 U.S. 444, 60 Sup. Ct. 321, 84 L.Ed. 377 (1940), in which the Supreme Court of the United States held that a delay of less than three days between the appointment of counsel and the *trial* in a capital case was a reasonable time.)

As this Court pointed out in *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 Sup. Ct. 330, 78 L.

Ed. 674 (1934), a state is "free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . . Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." See *Stein v. N.Y.*, 346 U.S. 156, 73 Sup. Ct. 1077, 97 L.Ed. 1522 (1953), approving the *Snyder* decision.

It is submitted therefore that Article 202 as interpreted in the *Wilson* case establishes a sound and valid procedural step, and that it provides a reasonable opportunity for anyone—white or black—to raise any question, including the question of systematic exclusion, with respect to grand juries.

V.

The limitation provided by Article 202 runs against a defendant who is a fugitive.

Petitioner Poret contends that the limitation provided by Louisiana R.S. 15:202 (Article 202, Code of Criminal Procedure) has no application against him because he was not arrested until after the period within which he could attack the grand jury had expired. The record contains ample evidence that Poret was a fugitive from November 12, 1950, the day this crime was com-

mitted, until he was arrested in Tennessee nearly a year later. Constant efforts of the New Orleans Police Department and of the Criminal Sheriff's office to locate Poret began on the date of the crime and continued until notice was received in October 1951, that he was incarcerated in the Tennessee State Penitentiary. (R. 37-40, R. 45).

The term of the grand jury which indicted Poret ended on March 5, 1951. (R. 5). Thus, Poret had from December 11, 1950, the date he was indicted, until March 8, 1951, within which he could file an attack upon the grand jury. *During this entire period and for some time thereafter he was a fugitive from justice.*

The trial judge found as a fact that Poret was a fugitive from Justice (R. 24), and the Louisiana Supreme Court reached the same conclusion.

Poret contends that he was not informed of the indictment against him until after the period for attacking the grand jury had expired. The record leaves no room for doubt that he was well aware of the fact that he was being sought by the police for this crime and that he therefore fled. There is not even an attempt either in the record or in the brief filed on his behalf to explain Poret's sudden disappearance. Had Poret not unlawfully fled, he would have been arrested immediately and would have been duly informed of the indictment against him.

As the Louisiana Supreme Court pointed out, Poret cannot take advantage of his own flight to extend the period within which the grand jury which indicted him could have been attacked. (R. 28-29)

> "It is not true that the defendant Poret was denied an opportunity to file his motion timely. He was indicted on December 11, 1950, and had until March 8, 1951, a period of almost three months, in which to file his motion to quash. His own actions to avoid prosecution caused him not to avail himself of his right to challenge the jury. During the time he could have filed the motion he was a fugitive by his own choice and will. If we concede that his flight made it impossible for him to file the motion timely, he himself brought about the situation which made it impossible. To our minds it would be improper to hold that the prescriptive period provided in the statute is applicable to an accused held under arrest within the jurisdiction of the court but is not applicable to an accused who of his own will and accord has absconded to avoid prosecution. Such a holding would be tantamount to rewarding the absconding person for his flight. Moreover, the article provides for a prescriptive period which runs against the accused, and he cannot by any acts of his own extend the time provided for the filing of the motion.
>
> "Defendant cites and relies on the case of

Carter v. Texas, 177 U.S. 422, 20 S. Ct. 687, 688, 44 L. Ed. 389. . . . The Supreme Court of the United States reversed his conviction and remanded the case, concluding that the defendant had been denied a right claimed by him under the Constitution of the United States. In doing so the court pointed out that the grand jury which indicted the defendant had been empanelled before the commission of the offense for which he was indicted, and that under this article he therefore never had an opportunity to challenge the array of the grand jury.

"We might observe that under the quoted Texas article no person indicted would ever have an opportunity after indictment to challenge the array of the grand jury which indicted him. This is not true under our article, and, as we have hereinabove pointed out, the defendant in the instant case was not denied an opportunity to file his motion to quash and have it considered by the court, but his failure to avail himself of this opportunity was caused by his flight. Under the circumstances of this case the case cited and relied on is not pertinent or controlling.

"We conclude therefore that under the facts of the instant case application of Article 202 to this defendant does not deprive him of the equal protection of the law and due process as guaranteed by the Constitutions of this state and the United States." *(State v. Labat*, 226 La. 201, 214-217, 75 S. (2d) 333 (1954).

Thus the Louisiana Supreme Court has placed its interpretation on Article 202 and has announced the principle that the limitation provided therein runs against a fugitive. Under the well-recognized principle already discussed, this Court should accept the Louisiana Supreme Court's interpretation of the Louisiana Statute.

There is no suggestion that the interpretation of the Louisiana Supreme Court in this respect is unreasonable, nor could any such suggestion be made. If a defendant could extend the time within which he could attack the grand jury by his own unlawful flight, he could completely thwart the purpose of Article 202, which is to give the State an opportunity at an early date while the proof is still available to justify the composition of its grand jury. If a defendant were successful in eluding arrest for an extended period, it might well be impossible for the State to produce the required proof. Thus by his unlawful flight a defendant would escape prosecution completely.

It is fundamental that a fugitive from justice cannot claim the benefit of a statute of limitations barring criminal prosecution after a certain period of time. (See 18 U.S.C.A. 3290) It is equally logical to deny a fugitive a reward by reason of his unlawful flight with respect to a statute which limits the time within which he can file technical pleadings.

VI.

Petitioner Labat was represented by effective counsel.

About two months before the expiration of the grand jury term, the Court appointed E. I. Mahoney, Esq., as counsel to represent petitioner Labat. (R. 1). About a year later, Mahoney withdrew as counsel, Labat being represented by his own counsel. (R. 1, 36). No attack upon the grand jury was filed until about a year and eight months after the end of the term of the grand jury, or nearly ten months after Labat secured the services of his own counsel. (R. 3).

Counsel for Labat contend in brief that he was denied due process because he was not represented by effective counsel during the period provided by Article 202 for filing an attack upon the grand jury.

It has been held that there is a presumption that appointed counsel is competent: *Feeley v. Ragen*, 166 F. 2d 976 (7th Cir. 1948); Cf. *Walker v. United States*, 218 F. 2d 80 (7th Cir. 1955). This presumption should be unusually strong in the instant case in view of a Louisiana statutory requirement that in capital cases appointed counsel must have "at least five years' actual experience at the bar". (La. R.S. 15:143).

Federal courts have been properly reluctant to set aside verdicts on the ground that the attorney

appointed to represent the accused was so incompetent that the accused did not have a fair trial. Thus in *United States v. Wight*, 176 F. 2d 376 (2nd Cir. 1949), the court said that "a lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice."

In the instant case, there is absolutely nothing to indicate that the appointment of Mr. Mahoney did not furnish Labat with effective counsel. As a matter of fact, the only portion of the record which treats Mahoney's qualifications is the following comment by the Louisiana Supreme Court:

> "The defendant Labat, who was arrested and imprisoned shortly after the commission of the crime, was represented by able, learned, and experienced counsel appointed by the court to represent him on January 5, 1951." R. 27. (For further evidence that Mr. Mahoney was eminently qualified, able and conscientious, see Appendix to this brief.)

It is suggested in Labat's brief that the mere fact that Mr. Mahoney did not timely file an attack upon the grand jury is proof that Labat lacked effective counsel. Actually, the fact that Mr. Mahoney did not file such an attack can be as significant of sagacity and strategy as of anything else. Mahoney may have determined that such an attack would be in vain, since he may have known as a

fact that there had been no systematic exclusion. Or perhaps, faced as he was with the overwhelming evidence which he knew the state would produce, and knowing that if the grand jury was in fact improperly empanelled a timely attack would result in an immediate indictment from a new grand jury, Mahoney may have decided to file his attack upon the grand jury after the time provided had expired, proceed to trial before a petit jury with the hope of saving Labat from a capital verdict, and, if unsuccessful, attempt to secure for him a second trial by appeal to this Court.

The State of Louisiana has been unable to find a single case in which any court has held that appointed counsel was inadequate simply because he did not file a particular pleading within a particular period. If the failure to file a timely attack upon the grand jury is evidence of inadequacy of counsel, then no limitation of any kind in a procedural statute would ever be effective. Whenever the limitation was not complied with, the result would be a finding that the defendant was not properly represented by counsel, thus relieving the defendant of the effect of the limitation. Obviously, this position is untenable.

CONCLUSION

It is respectfully submitted that this Honorable Court does not have jurisdiction in this case, the decision of the Louisiana Supreme Court being

based on an adequate non-federal ground *(State v. Wilson, supra)*; that the writ in this case should therefore be declared to have been improvidently granted; and that the judgment of the Louisiana Supreme Court should be affirmed.

FRED S. LeBLANC,
Attorney General.
MICHAEL E. CULLIGAN,
Assistant Attorney General.
LEON D. HUBERT, JR.,
District Attorney.
ADRIAN G. DUPLANTIER,
First Asst. District Attorney.

CERTIFICATE

This is to certify that a copy of this brief has this day been delivered to the Hon. Rudolph F. Becker, Jr., Maritime Bldg., New Orleans, Louisiana, Attorney for Clifton Poret, and the Hon. Felicien Y. Lozes, American Bank Bldg., New Orleans, Louisiana, Attorney for Edgar Labat, by depositing the same and addressing to him, as aforesaid, in the United States mail at New Orleans, Louisiana.

New Orleans, Louisiana, this_____day of September, 1955.

_____
Assistant Attorney General

APPENDIX

New Orleans States June 1, 1955

LEGAL PROFESSION HONORS ATTY. EDWIN I. MAHONEY

The legal profession honored one of its oldest and most respected members today.

Veteran attorney Edwin I. Mahoney was eulogized as an "astute and honored criminal lawyer" in a ceremony in Judge Frank T. Echezabal's section of criminal district court.

A plaque honoring Mahoney was presented by Mrs. Dorothy T. Horton, president of the Criminal Courts Bar Association.

Judges of the criminal court sat en banc during the ceremony.

Mahoney, a former state legislator, has been practicing law for 52 years in all of the city and state courts.

The plaque read:

". . . . an astute and honored criminal lawyer who has ever been mindful of the oath administered him 52 years ago to uphold the law and to guarantee to each accused his day in court."

The courtroom was filled with members of the judiciary from the municipal civil and federal courts, members of the district attorney's and U.S. attorney's office, the criminal sheriff's office, criminal district court attaches, and members of his family.

Speakers included Judges Echezabal, George P. Platt, Fred W. Oser, Bernard J. Cocke, Niels F. Hertz and J. Cleveland Fruge, Judge William J. O'Hara could not be present and his greeting was read by Mrs. Horton.

Robert LeCorgne, Secretary of the state bar association, also spoke briefly for the lawyers of the state.

Presiding over the ceremony was Charles Byrne, an attorney.